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CLERK OF DISTRICT COURT
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

BILLINGS EDUCATION ASSOCIATION,
MEA,

Petitioner,

- vs -

MONTANA BOARD OF PERSONNEL
APPEALS and TRUSTEES OF
YELLOWSTONE COUNTY SCHOOL
DISTRICT NO. 2,

Respondent.

Cause No. CDV-85-937

MEMORANDUM AND ORDER

BILLINGS ELEMENTARY SCHOOL
DISTRICT NO. 2 and HIGH SCHOOL
DISTRICT NO. 2, YELLOWSTONE
COUNTY, MONTANA,

Cross-petitioner,

- vs -

MONTANA BOARD OF PERSONNEL
APPEALS AND BILLINGS EDUCATION
ASSOCIATION, MEA,

Cross-respondents.

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Before the Court are a Petition for Judicial Review
filed by the Billings Education Association (BEA) and a Cross
Petition filed by Billings Elementary School District No. 2
and High School District No. 2 (District). Both Petitions
address the Final Order of the Board of Personnel Appeals

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CLARA GILREATH, Clerk of District Court

By MARY Denny Deputy

1 (BPA) of August 27, 1985. Briefs having been filed by BEA,
2 the District and the BPA and oral argument having been heard,
3 the matter is ready for decision.

4 PROCEDURAL BACKGROUND

5 In late January 1984, the BEA conducted a survey among
6 the teachers at Lincoln Junior High School in Billings, Montana.
7 The results of the survey were given to Dr. William K. Poston,
8 Jr., Superintendent of the District (Poston) on February 9,
9 1984, and were distributed to the Lincoln School staff and
10 to Trustees of the District.

11 On March 7, 1984, Poston sent a letter to BEA President
12 Mark Jones (Jones) strongly protesting the survey and its
13 distribution. Poston advised Jones that the District's attorney
14 had informed him that statements in the survey were libelous
15 and circulation of the survey presented grounds for legal
16 action and disciplinary action relative to employment against
17 those persons involved in "soliciting, compiling and distribu-
18 ing" the survey results. Poston also asked Jones to meet
19 with him in Poston's office on March 3, 1984. Jones attended
20 that meeting as requested. Subsequently, on March 15, 1984,
21 the BEA filed an unlawful labor practice charge with the
22 BPA against the District, alleging in Count I that the March
23 7th letter constituted a threat to discipline union members
24 engaged in protected, concerted activity, in violation of
25 Section 39-31-401(1) and (3), MCA, and Section 39-31-201,

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1 MCA. The second Count alleged that Jones had been denied
2 presence of a union representative at his meeting with Poston.

3 Count III of the charge involved an unrelated situation.
4 On February 28, 1984, Poston had met with his "cabinet,"
5 a group of central office administrators and a building
6 principal who commonly met to discuss and handle District
7 concerns. The informal minutes of that meeting included
8 the following:

9 The soliciting of Board Members on concerns of
10 the school district, without following through
11 the chain of command, prior to going to the Board
12 (sic), will be considered as an act of insubordina-
13 tion. Those staff members not observing this
14 procedure can expect to receive the appropriate
15 reprimand. This will effect (sic) all staff
16 members.

17 Count III of the Unfair Labor Practice charge addressed the
18 above paragraph and said, in pertinent part:

19 Board members are elected public officials
20 and any member of the bargaining unit has a right,
21 protected by the United States and Montana con-
22 stitutions, to contact elected officials for
23 the redress of grievances. Threatening a reprimand
24 for the exercise of such rights is a violation
25 of Section 39-31-401(1), MCA, which protects
the Section 39-31-201, MCA, rights of the employees.

26 A hearing was held before Hearing Examiner Rick D'Hooze,
who issued comprehensive, detailed (80 pages) Findings of
Fact, Conclusions of Law and Recommended Order on August
30, 1984. The Hearing Examiner found in regard to Count
I that the subject survey was a concerted, protected activity
under Section 39-31-201, MCA, and that Poston's March 7th

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1 letter and the March 9th meeting with Jones constituted an
2 unfair labor practice. The Hearing Examiner's recommendation
3 was that the District be ordered to cease and desist from
4 "interfering with protected concerted activities of the BEA
5 or its members as stated in Section 39-31-201, MCA, by trying
6 to stop future Lincoln survey reports." The Hearing Officer
7 recommended dismissal of Counts II and III.

8 Both the BEA and District filed Exceptions to this Order.
9 The BEA excepted to the dismissal of Count III, and the District
10 to the Hearing Examiner's determination relative to Count I.
11 No exceptions were filed with respect to Count II and it
12 is not before the Court.

13 A hearing was held before the full Board of Personnel
14 Appeals (BPA) and post-hearing briefs were filed. The BPA's
15 Final Order of August 27, 1985, denied the BEA's exception
16 to Count III. As to the District's Exceptions to Count I,
17 the Final Order stated as follows:

18 1. It Is Ordered that this Board adopts
19 Findings of Fact of Hearing Examiner Rick D'Hooge
20 and all portions of the Hearing Examiner's dis-
21 cussion that are consistent with this Final Order.
(Emphasis supplied)

22 . . .

23 3. It Is Ordered that this Board substitute
24 its own Conclusions of Law for that of the Hearing
25 Examiner as follows.

'That since the BEA conducted a survey subsequent
to the Lincoln School Survey, the March 7 letter
and the March 9 meeting did not constitute a

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1 threat to discipline members for engaging in
2 protected concerted activities in violation of
Section 39-31-401(1), MCA.'

3 BPA's Final Order, pp. 1-2.

4 From this Final Order, both parties appeal. While the
5 BEA's Petition addresses solely Count I of the Final Order,
6 in its brief it argues that the BPA should be reversed on
7 Count III as well. The District objects to the Final Order
8 "to the extent that the Board's Final Order may be interpreted
9 as finding that the BEA was engaged in protected concerted
10 activities under Section 39-31-201, M.C.A. when it solicited,
11 compiled and distributed the Lincoln Survey Report . . ."
12 (District's Response and Cross-Petition, p.3) The alignment
13 of the parties is as follows: The BEA agrees with BPA that
14 the Lincoln Survey was "protected activity" while challenging
15 the BPA's Final Order dismissing Counts I and III. The District
16 and the BPA agree that dismissal of both Counts is proper,
17 but disagree as to whether or not the Lincoln Survey constituted
18 a protected activity.

19 FACTUAL BACKGROUND

20 Neither party has made specific objections to the Hearing
21 Examiner's Findings of Fact, adopted by the Board. For that
22 reason, the factual background recited here is derived from
23 those findings along with various evidentiary documents in
24 the record. No written transcript of the hearing of August
25 30, 1984, was provided the Court.

1 Prior to the commencement of the 1983-1984 school year,
2 two new administrators were assigned to Lincoln Junior High
3 School in Billings: Carolyn McKennan, Principal, and Carol
4 Chatlain, Dean of Students. Prior to her appointment to
5 that post, Ms. McKennan had been a successful elementary
6 school principal but had had no previous experience in a
7 junior high setting as either teacher or principal. Her
8 disciplinary beliefs and values differed from those of previous
9 administrators at Lincoln. She believed, for example, in
10 setting disciplinary rules on an as-needed basis, not before-
11 the-fact. While she explained her ideas at a faculty meeting
12 at the beginning of the 1983-1984 school year, some teachers
13 did not understand or were confused about her policy. (Findings,
14 Nos. 3, 5, pp. 6 and 7) By the second week of the school
15 year, Jones was receiving phone calls from Lincoln teachers.
16 Through November and December of 1983, he continued to advise
17 the teachers to give the new administration time to "work
18 into a junior high setting." (Finding, No. 6, p. 8) Although
19 individual teachers tried to talk with Ms. McKennan and Chatlain,
20 they testified that they found the "doors closed" and "walls
21 up" to any discussion. (Findings, No. 8, p. 9) While no
22 committee of teachers ever asked McKennan to attend a meeting
23 to discuss their problems, McKennan testified that she was
24 "somewhat uncomfortable" with such a meeting and would have
25 preferred a meeting with a small group or one-on-one. (Finding,

1 No. 8, pp. 9 - 10)

2 Dr. Poston was aware of the Lincoln problems by mid-fall,
3 1983. Joyce Butler, MEA Uniserv Director for the Billings
4 area, had advised Poston of those problems and that she planned
5 to gather additional information which she would share with
6 him. Poston testified that he encouraged such input. (Finding,
7 No. 8, p. 10) In January 1984, in the midst of a disciplinary
8 incident involving a Lincoln teacher and student, Butler
9 told both Jones and Poston that she planned to survey the
10 Lincoln teachers relative to their situation. Poston did
11 not disagree, but stated that he desired specific information
12 relative to any problems. (Finding, No. 11, pp. 11 - 12)

13 Butler and Jones met with 35 - 38 Lincoln teachers on
14 January 26, 1984. Following about 45 minutes of open discussion,
15 Butler presented and explained the survey form. She informed
16 the teachers that specific information and constructive
17 recommendations were needed. However, she also informed
18 them that signatures on the survey were optional, that the
19 survey results would be confidential and that from the results
20 a report would be prepared for Poston and the BEA. (Finding,
21 No. 13, pp. 12 - 13) Anonymity was to be maintained as the
22 Lincoln teachers were afraid of reprisals if they could be
23 identified from the survey report. (Finding, No. 15, p. 14)

24 The survey that was utilized requested four items of
25 demographic information, then asked the following two open-

1 ended questions:

2 5. What is your major concern(s) with your present
teaching assignment in Lincoln?

3 6. What constructive recommendations would you
4 propose to remedy the present situation?

5 (Finding, No. 14, p. 14)

6 Replies to Questions 5 and 6 were typed in a verbatim
7 list, which Butler categorized and from which she derived
8 a list of 22 "General Concerns," six "Recommendations From
9 the Faculty" and 9 other "Recommendations," the latter
10 apparently offered by Butler herself. The "Conclusion"
11 arrived at, again apparently by Butler, was that a "negative
12 spirit" dwelt at Lincoln, that there was little effective
13 communication among the certified staff and that "feelings
14 of fear, reprisal and antagonism seem(ed) to reign over the
15 staff." (Finding, No. 22, pp. 18 - 21) To those introductory
16 pages was added the verbatim list of the teachers' responses
17 to items 5 and 6.

18 The Hearing Examiner made a statistical analysis of
19 the responses to questions 5 and 6, apparently in consideration
20 of the District's contention that the goal of the teachers
21 and their union was to unlawfully force a change of administrators
22 at Lincoln. (Finding, No. 22, p. 29) He determined that the
23 main purpose of the BEA, MEA and Lincoln teachers was not
24 to change Lincoln administration, but to gather information
25 to be used to improve the teachers' working conditions.

1 (Findings 23 and 24, pp. 29 - 32) In that goal, the survey
2 report failed. Dr. Poston testified that it did not accomplish
3 the effect desired by Jones and Butler, that it had "no effect
4 on the school Board in carrying out the policies of the school
5 Board." (Finding, No. 31, p. 38)

6 The report, complete with verbatim responses, was handed
7 to Poston at a breakfast meeting attended by Jones, Butler,
8 Poston and Gary Rogers, Director of Secondary Education, on
9 February 9, 1984. Despite the BEA's intention that only
10 teachers and administrators at Lincoln, central office administrators
11 and the school board were to receive copies of the report, it
12 was distributed throughout the school system, the city of
13 Billings and other parts of the state. There was conflicting
14 testimony as to how and by whom such wide distribution was
15 accomplished. The distribution was, however, apparently
16 accomplished in the two or three days after February 9, 1984.
17 (Finding, No. 30, pp. 35 - 37; Finding, No. 32, p. 39)

18 On March 7, 1984, Jones received a letter from Poston
19 which ended with this paragraph:

20 As there are grounds for both litigation against
21 the Billings Education Association and disciplinary
22 action against yourself and other teachers involved
23 in gathering and distributing the survey results,
24 these are options to which the Board of Trustees
25 must give serious consideration. I therefore
ask that you cease and desist any further distribu-
tion of or comment on the survey results, and
that you meet with me at my office on Friday,
March 9, 1984, at 2:15 p.m., to further discuss
this issue and its ramifications.

(Finding, No. 33, p. 41)

1 Jones attended the March 9th meeting at which McKennan
2 was also present. Poston restated the contents of the March
3 7th letter, asked Jones for information relative to the persons
4 responsible for the origination of the survey and asked what
5 Jones thought would be appropriate disciplinary action. Jones
6 refused to answer those questions, though he did tell Poston
7 to whom the BEA had distributed reports. (Finding, No. 36,
8 pp. 42 - 43)

9 Dr. Poston testified that it was not his intention to
10 discipline Mr. Jones, that the objective of the School District
11 was to stop the Lincoln Survey Report from recurring. No
12 one was ever disciplined for the Lincoln Survey, the report
13 or its distribution. (Finding, Nos. 38 and 39, pp. 43 - 44)

14 Later that school year, the BEA conducted a survey at
15 Meadowlark Elementary School. Dr. Poston testified that
16 the results of that survey were not distributed to other
17 schools or to the community, provided the administration
18 with good information, were not libelous in nature though
19 some parts were non-specific, and were what Poston had expected
20 of the Lincoln Report. Jones testified that, from the Lincoln
21 Report, the BEA learned how to keep the survey under control.
22 (Finding, No. 43, pp. 45 - 48)

23 STANDARD OF REVIEW

24 The Montana Administrative Procedures Act (MAPA), Section
25 2-4-704(2) sets forth the standard of judicial review of contested

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1 administrative cases.

2 (2) The court may not substitute its judgment
3 for that of the agency as to the weight of the
4 evidence on questions of fact. The court may
5 affirm the decision of the agency or remand the
6 case for further proceedings. The court may
7 reverse or modify the decision if substantial
8 rights of the appellant have been prejudiced
9 because the administrative findings, inferences,
10 conclusions, or decisions are:

11 (a) in violation of constitutional or statutory
12 provisions;

13 (b) in excess of the statutory authority
14 of the agency;

15 (c) made upon unlawful procedure;

16 (d) affected by other error of law;

17 (e) clearly erroneous in view of the reliable,
18 probative, and substantial evidence on the whole
19 record;

20 (f) arbitrary or capricious or characterized
21 by abuse of discretion or clearly unwarranted
22 exercise of discretion; or

23 (g) because findings of fact, upon issues
24 essential to the decision, were not made although
25 requested.

26 The Montana Supreme Court has clarified the application
of the terms "clearly erroneous" and "abuse of discretion."

[F]indings of fact by an agency have been
subject to a 'clearly erroneous' standard of
review by the courts. . . . Conclusions of law
are subject to an 'abuse of discretion' review.
These standards differ due to the agency's expertise
regarding the facts involved and the court's
expertise in interpreting and applying the law.
(Citations omitted)

City of Billings v. Billings Fire Fighters Local No. 521, 200
Mont. 421, 430, 651 P.2d 627, 632 (1982)

DISCUSSION

Because Montana has developed little precedent to interpret Sections 39-31-201 and 39-31-401, MCA, Montana courts generally look to federal case law for guidance in labor relations cases. See Teamsters Local 45 v. Board of Personnel Appeals and Stewart, McCarvel, 195 Mont. 272, 635 P.2d 1310 (1981).

Count I

In addressing Count I of Unfair Labor Practice charge 3-84, Hearing Examiner D'Hooze framed the issue: "DID DR. POSTON BY TRYING TO STOP THE LINCOLN SURVEY REPORT FROM HAPPENING IN THE FUTURE INTERFERE WITH PROTECTED CONCERTED ACTIVITIES OF THE BEA?"

The Hearing Examiner's first step in analyzing this question was to determine whether the activities of the BEA in conducting, compiling and distributing the Lincoln Survey were protected activities under Section 39-31-201, MCA. His second step was to determine whether Poston's letter of March 7, 1984, was a threat to the union, in violation of Section 39-31-401, MCA.

D'Hooze first set forth the test developed in NLRB v. Electrical Workers (Jefferson Standard), 346 U.S. 465, 74 S.Ct. 172, 98 L.Ed 195 (1953) and the line of cases following it. See, e.g., Roanoke Hospital v. NLRB, 538 F.2d 607 (4th Cir. 1976); NLRB v. Greyhound Lines, 660 F.2d 354 (8th Cir. 1981); NLRB v. Mount Desert Island Hospital, 695 F.2d 634

1 (1st Cir. 1982).

2 1. DID THE APPEAL TO THE PUBLIC CONCERN
3 PRIMARILY WORKING CONDITIONS?

4 2. DID THE APPEAL TO THE PUBLIC NEEDLESSLY
5 TARNISH THE COMPANY'S IMAGE?

6 (a) WERE THE ASSERTIONS MADE IN RECKLESS
7 DISREGARD OF THE TRUTH?

8 (b) WERE THE ASSERTIONS MADE IN THE SPIRIT
9 OF LOYAL OPPOSITION - NOT OUT OF MALICE OR ANGER?

10 (Hearing Examiner's Discussion, p. 59)

11 D'Hooge applied the facts of the Lincoln situation to
12 that legal standard.

13 1. He determined that concerns of the student discipline
14 and teacher evaluation have an effect on teachers' working
15 conditions (Finding, No. 7, pp. 8 - 9) and that the Lincoln
16 Survey Report involved an on-going labor dispute, noting
17 that Lincoln teachers had tried to talk to their building
18 administrators and that Poston himself had been advised of
19 the problem in the fall of 1983. (Finding, No. 8, pp. 9 -
20 10)

21 2. D'Hooge further determined that the Lincoln Survey
22 Report did not needlessly tarnish the image of Lincoln Junior
23 High School or District No. 2, noting that the BEA did not
24 state that the District provided a poor education. (Discus-
25 sion, pp. 60 - 62) He compared and distinguished a number
of NLRB cases on the question before making that determination.
He referred to Roanoke wherein the employer had alleged that

1 statements made on local television by nurses "intentionally
2 or negligently disparaged and discredited the quality of
3 nursing care available at the hospital, to the point of
4 insinuating that it was unsafe," (538 F.2d at 610) and to
5 Mount Desert in which an employee's letter to a newspaper
6 editor had complained about staffing levels, working condi-
7 tions and patient care and services. (695 F.2d at 636) In
8 both those cases, the employees took their complaints directly
9 to the public, yet the federal courts found the employees'
10 public statements to be protected under National Labor Rela-
11 tions Act (NLRA) Section 7 and 8(a) [Section 39-31-201,
12 39-31-401, MCA.] (Discussion pp. 60 - 62)

13 A distinction which stands out between Roanoke and Mount
14 Desert and this action is that here, although the Lincoln
15 teachers discussed going to the public with their concerns,
16 they decided they did not want everyone to know of their
17 problem. (Finding, No. 13, p. 13) Jones testified that
18 it was not proper for the Survey Report to be general know-
19 ledge, that the BEA was attempting to resolve the problem
20 internally at the lowest level and that the BEA only intended
21 to give copies of the Survey Report to the people involved.
22 (Finding, No. 31, p. 37)

23 2.(a) Addressing the truth of the survey statements,
24 D'Hooge did find that some statements were not accurate.
25 However, he also found that the statements did not meet the

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1 test for being maliciously false or deliberately and reck-
2 lessly untrue. D'Hooge cited, among others, Texaco Inc.,
3 v. NLRB, 462 F.2d 812 (1972) and Linn v. United Plant Guard
4 Workers of America, 383 U.S. 53, (1966), where it was stated,
5 "the most repulsive speech enjoys immunity provided it falls
6 short of a deliberate or reckless untruth." D'Hooge found
7 that such statements as "discipline policy - none" resulted
8 from the teachers' misunderstanding or confusion rather than
9 outright fabrication. (Discussion at p. 64)

10 2.(b) Finally, D'Hooge found no malice or anger in
11 statements made on the survey report. After citing examples
12 of both malice and lack of malice from federal precedent,
13 D'Hooge pointed to his Findings, Nos. 12, 13, 18, 22, 23, and
14 24 evidencing the BEA's objectives, absent malice or anger,
15 to attempt to improve the School District.

16 From the above, D'Hooge concluded that when the BEA
17 solicited, compiled and distributed the Lincoln Survey Report,
18 it was engaged in protected, concerted activities under the
19 Jefferson Standard Test as implemented by the NLRB and the
20 courts.

21 The District argues that the survey report was not pro-
22 tected primarily on the basis of the District's allegation
23 that the BEA was unlawfully attempting to replace Lincoln
24 administrators, an act reserved to the employer. In making
25 this argument, the District relies on NLRB v. Red Top, Inc.,

1 455 F. 2d 721 (8th Cir. 1972) and Puerto Rico Food Products
2 Corp. v. NLRB, 619 F.2d 153 (1st Cir. 1980).

3 In Redtop, employees were angered by their supervisor's
4 negative evaluations. In addition to threatening to go to
5 his supervisor with their complaints, various employees threatened
6 the supervisor with physical reprisals, pounded their fists
7 on his desk and a chair and cursed. The Eighth Circuit affirmed
8 the hearing examiner's findings that such acts took the
9 employees out of the protection of Section 7 of NLRA (39-31-201,
10 MCA):

11 We quite agree with the board's general rationale
12 that employees may not be discharged for rude
13 or impertinent conduct in the course of presenting
14 grievances . . . but we do not think the pro-
15 tection afforded by Section 7 should extend
16 to gross insubordination, threats of physical
17 harm or the carrying out of activities detri-
18 mental to the employer's business relation-
19 ship . . .

18 455 F.2d at p. 728

19 Puerto Rico Food Products established the rule that
20 employee protests over supervisors is a protected activity
21 only if (1) the unpopular supervisor is a low-level supervisor
22 whose identity constitutes a "working condition" for the
23 employees, and (2) the protest is reasonable. The court,
24 in its discussion, stated that:

25 Generally where employee protests over supervisory
personnel have come within the arguable purview
of Section 7 the supervisor has been linked with
an underlying employment related concern.
(Emphasis added)

619 F.2d at p. 156

1 The Hearing Examiner considered Red Top and Puerto Rico
2 Food, along with other NLRB cases involving employee dis-
3 satisfaction with supervisors. He set out, at page 69 of
4 his discussion, the legal standard derived from a long line
5 of such cases.

6 (a) THE EMPLOYEE PROTEST OR ACTIVITY OVER
7 A CHANGE IN SUPERVISORY PERSONNEL MUST IN FACT
8 BE A PROTEST OVER THE ACTUAL CONDITIONS OF THEIR
9 EMPLOYMENT.

10 (b) THE MEANS OF PROTEST MUST BE REASONABLE.

- 11 - GENERALLY STRIKES OVER CHANGES IN
12 EVEN LOW LEVEL SUPERVISORY PERSONNEL
13 ARE NOT PROTECTED.
- 14 - LETTER WRITING EXPRESSING OPPOSITION
15 AND/OR VOICING OF COMPLAINTS FOUND
16 PROTECTED.

17 (a) Applying the above standard to the Lincoln situation
18 and citing Findings, Nos. 5, 6, 7 and 22 relative to student
19 discipline and teacher evaluation, the Hearing Examiner determined
20 that those matters clearly affected teachers' working conditions.

21 (b) Relative to the reasonableness of the union's action,
22 D'Hooge reiterated that the activities of the BEA and/or
23 the teachers had been found to be protected, concerted activities
24 under Jefferson Standard, the two-pronged test of which includes
25 an evaluation of how reasonably the activities were conducted.
(Discussion, p. 70)

Based on his analysis, the Hearing Examiner made the
following Conclusion of Law:

1 The Lincoln Survey Report was protected
2 concerted activities under Section 39-31-201,
3 MCA. By his March 7 letter and his March 9
4 meeting, Dr. Poston tried to stop the Lincoln
5 Survey Report from happening again in the future,
6 a violation of Section 39-31-401(1), MCA.
7 (Emphasis added to first sentence)

8 The BPA, in its Final Order, substituted its own Con-
9 clusion of Law: "That since the BEA conducted a survey sub-
10 sequent to the Lincoln School Survey, the March 7 letter
11 and the March 9 meeting did not constitute a threat to dis-
12 cipline members for engaging in protected concerted activities
13 in violation of Section 39-31-401(1), MCA."

14 While its Final Order did not expressly state that the
15 BPA was adopting the underscored sentence of the Hearing
16 Examiner's Conclusion, the implication in its very limited
17 Conclusion is that the BEA members had engaged in protected
18 concerted activities. That implication is supported by the
19 BPA's arguments in this action. In its response brief of
20 April 24, 1986, the BPA states:

21 . . .

22 First of all, the Board affirmed the Hearing
23 Examiner finding that the survey constituted
24 protected concerted activity. It does not dispute
25 the finding that the School District threatened
26 BEA members with disciplinary action. However,
27 it did not find that the threat constituted a
28 violation of Section 39-31-401(1), MCA.

29 (BPA's brief dated April 24, 1986, p. 4)

30 As noted, in reviewing an agency's decision, the Court
31 will defer to the agency's interpretation of the pertinent

1 statutes under the particular facts of the action and will
2 not disturb the agency's determination unless that interpretation
3 is arbitrary, capricious or an abuse of discretion. Hearing
4 Officer D'Hooge made a systematic and comprehensive review
5 of NLRB actions in determining that the BEA activities relative
6 to the subject survey report were protected concerted activities
7 pursuant to Section 39-31-201, MCA. Finding no abuse of dis-
8 cretion, this Court will not disturb that determination.

9 Did Poston's Letter and the Subsequent Meeting Constitute
10 a Threat?

11 The second step in analyzing Count I of the Unfair Labor
12 Practice charge is to determine whether Poston's letter of
13 March 7, 1984, and the meeting of March 9, 1984, constitute
14 an unlawful threat to employees' protected activities.

15 In addition to its primary contention that the BEA activities
16 were not protected, the District argues that the March 7th
17 letter did not constitute a threat because (1) it was not
18 a specific threat and (2) no disciplinary action was intended
19 or taken. (District's brief of April 24, 1986, p. 11) The
20 District cites no authority to support its argument to the
21 Court but it was the same argument made to the Hearings
22 Examiner who, in addressing those points (Finding, No. 39,
23 p. 44), determined that this was not the test to be applied.
24 He cited Bill Johnson's Restaurant v. NLRB, 660 F. 2d 1335,
25 1341 (9th Cir. 1982) as the proper test.

1 The Board found that the restaurant had violated
2 section 8(a)(1) by threatening and interrogating
3 employees. An employer's interrogation of an
4 employee violates section 8(a)(1) if, under all
5 the circumstances, the interrogation reasonably
6 tends to restrain or interfere with the employee
7 in the exercise of his or her protected § 7 rights.
8 . . . The test is whether the interrogation tends
9 to be coercive, not whether the employee was in
10 fact coerced. (Citations omitted)

11 Applying that test, D'Hooge found that Poston's letter and
12 the meeting did tend "to be coercive because of the number
13 of times libel and litigation are stated." (Finding, No.
14 39, p. 44)

15 The District suggests a third argument for dismissing
16 Count I, i.e., that the subsequent successful survey at
17 Meadowlark Elementary School somehow cured any alleged attempt
18 to interfere with the first survey. This argument was not
19 made before the Hearing Officer but is offered by the District
20 as a possible rationale for the BPA's Conclusion of Law.
21 The District cites Passavant Memorial Area Hospital v. NLRB,
22 98 LRRM 1492, 1493 (1978) for the principle of labor law
23 which holds that if unlawful employer behavior is modified
24 so that the interference with protected activities does not
25 continue, any asserted unfair labor practice is cured and
dismissal is proper.

It is settled that under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct.'

1 and 'free from other proscribed illegal conduct.'
2 (Cites omitted) Furthermore, there must be
3 adequate publication of the repudiation to the
4 employees involved and there must be no pro-
scribed conduct on the employer's part after
the publication. (Cite omitted)

5 This argument is not supported by the record. Not only
6 was the argument never made before the BPA, but there is
7 no indication in the record before the Court that the District
8 ever repudiated Dr. Poston's actions. On the contrary, the
9 District has contended throughout this action that the BEA's
10 activities were not protected and that no threat occurred.

11 As noted in the review of the factual background of
12 the matter, neither the BEA nor the District has made specific
13 objections to the Hearing Examiner's Findings of Fact, adopted
14 en toto by the BPA. It is apparent that the District does
15 not agree with all the Hearing Examiner's Findings. For
16 example, in its brief of April 24, 1986, the District states,
17 "It was admitted at the hearing that BEA members were responsible
18 for this wide distribution [of the Survey Report]," citing
19 Finding of Fact, No. 30. That statement is not an accurate
20 representation of the Hearing Examiner's Finding. D'Hooge,
21 in discussing how the Survey Report was distributed, referred
22 to specific testimony of eight separate witnesses. (Finding,
23 No. 30, pp. 35 - 37), in making the determination that "the
24 additional circulation, above the BEA distribution, cannot
25 be attributed to the BEA or denied by the BEA." (Discussion,

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1 p. 48) Any objections the District may have appear to go
2 to the weight of the evidence rather than its substance and
3 are not supported by evidence showing that the Hearing Examiner's
4 Findings are clearly erroneous in view of the reliable, pro-
5 bative and substantial evidence on the whole record. Section
6 2-4-704(2), MCA; City of Billings, supra.

7 Absent such a showing, the Court will not disturb the
8 Findings of the Hearing Examiner.

9 Count III

10 Although the BEA did not in its Petition request review
11 of the dismissal of Count III, the issue was argued by all
12 parties in their briefs and, therefore, I will address it.

13 Count III of the Unfair Labor Practice charge goes to
14 the minutes of Superintendent Poston's "cabinet meeting"
15 of February 28, 1984, and involves a situation unrelated
16 to the Survey Report. The Boulder Elementary School Faculty
17 had objected to letters of appreciation for United Way dona-
18 tions being placed in teachers' personnel files. Apparently
19 the Boulder faculty had informed the District No. 2 Board
20 of Trustees of their objection and the Trustees had directed
21 Poston to discontinue the practice. It was this act of direct
22 communication with the Board of Trustees which led to the
23 discussion in "cabinet" on February 28, 1984. As noted
24 earlier in this Opinion, the minutes of that meeting included
25 a statement to the effect that should staff members make

1 contact with Board members other than through the chain of
2 command, they could expect to receive reprimands. Count
3 III alleged that the District, through its agent Poston,
4 was attempting to prevent BEA members from making any direct
5 contact with School Board Trustees.

6 It is undisputed that School Board policy 272 P establishes
7 a line of responsibility requiring that all personnel refer
8 matters requiring administrative action to the administrator
9 in charge of the problem area. (Finding, No. 28, p. 34)

10 There was no evidence of the District using that policy to
11 interfere with protected BEA activities. (Finding, No. 29,
12 p. 34) Dr. Poston's testimony that the contested excerpt
13 from the cabinet meeting was inaccurate is not disputed.
14 (Finding, No. 28, p. 34)

15 Under these facts, the Court finds no error in the Board's
16 dismissal of Count III of the Unfair Labor Practice charge.

17 BPA's Conclusion of Law

18 The BPA's Conclusion of Law relative to Count I is impossible
19 to comprehend. No legal authority nor rationale is offered
20 for its rejection of the Hearing Examiner's Conclusion of
21 Law, the Order merely stating that the BPA was adopting the
22 Hearing Examiner's Findings of Fact and "all portions of
23 the Hearing Examiner's Discussion that are consistent with
24 this Final Order."

25 In its arguments to the Court, the BPA states that:

1 First of all, the Board affirmed the Hearing
2 Examiner's finding that the Survey constituted
3 protected concerted activity. It does not
dispute the finding that the School District
threatened BEA members with disciplinary action.

4 (BPA Response Brief, April 24, 1986, p. 4)

5 "The School District did threaten disciplinary action, but
6 the issue is whether such a threat constituted a violation
7 under law." (Id. at p. 7. Emphasis in original)

8 The BPA went on to make a statement which appears to
9 be the key to its Conclusion of Law in the Final Order: "The
10 Hearing Examiner concluded that the purpose of the threat
11 was to stop the school surveys from being conducted in the
12 future." (Id.) This is a misstatement. The Hearing Examiner's
13 Conclusion was much more limited, encompassing solely the
14 Lincoln Survey Report. His recommended order was likewise
15 limited. There is no evidence on the record that the District
16 attempted to stop all school surveys. Therefore, a subsequent
17 survey, absent repudiation by the District of its threat,
18 has no legal significance.

19 In a less extensive discussion involving a less complex
20 legal question, the Court might be able effectively to determine
21 on what legal grounds the BPA relies. Here, Hearing Examiner
22 D'Hooge filled 34 legal-sized pages with extensive case law
23 and legal tests of standards and comprehensive discussion
24 of the application of that law to those facts. The BPA has
25 given no clue as to which legal authorities or interpretations

1 governed its Conclusion and Order.

2 Absent legal support for its Conclusion of Law, the
3 BPA's rejection of the Hearing Examiner's Conclusion can
4 only be deemed arbitrary or characterized as an abuse of
5 discretion, prejudicial to substantial rights of Petitioner
6 BEA. I conclude, therefore, that the Final Order should be
7 modified. The recommended Conclusion of Law and Order of
8 the Hearing Examiner relative to Count I should be reinstated.
9 The dismissal of Count III should be affirmed.

10 NOW, THEREFORE, IT IS ORDERED that the Final Order of
11 the Board of Personnel Appeals as it relates to Count I is
12 reversed and the Board is directed to adopt the recommended
13 order of its Hearing Examiner. With respect to Count III,
14 the Final Order of the Board is affirmed.

15 DATED this 15th day of December, 1986.

16
17 
18 DISTRICT JUDGE

19 pc: Sol Lovas
20 Emilie Loring
21 Mary Ann Simpson
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STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

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APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-84

BILLINGS EDUCATION ASSOCIATION
BEA,

Complainant,

vs.

YELLOWSTONE COUNTY SCHOOL
DISTRICT NO. 2, BILLINGS,
MONTANA

Defendant.

FINAL ORDER

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The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Rick D'Hooge on May 22, 1985.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Emilie Loring, attorney for the Complainant, on June 7, 1985 and by Lawrence Martin, attorney for the Defendant, on June 12, 1985.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, July 31, 1985.

After reviewing the record and considering the briefs and oral arguments the Board orders as follows:

1. It is Ordered that this Board adopts the Findings of Fact of Hearing Examiner Rick D'Hooge and all portions of the Hearing Examiner's Discussion that are consistent with this Final Order.

2. It is Ordered that BEA's exceptions to Count III be denied.

3. It is Ordered that this Board substitute its own Conclusions of Law for that of the Hearing Examiner as follows. "That since the BEA conducted a survey subsequent to the Lincoln School survey, the March 7 letter and the

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1 March 9 meeting did not constitute a threat to discipline
2 members for engaging in protected concerted activities in
3 violation of Section 39-31-401(1) MCA.

4 4. It is Ordered that this Board substitute its own
5 Final Order for the Hearing Examiner's Recommended Order as
6 follows: "It is the Final Order of this Board that the
7 matter of Unfair Labor Practice charge No. 5-84 be dis-
8 missed."

9 Dated this 22 day of August, 1985.

10 BOARD OF PERSONNEL APPEALS

11
12 By: Alan L. Joselyn

13 Alan L. Joselyn
Chairman

14 CERTIFICATE OF MAILING

15 The undersigned does certify that a true and correct
16 copy of this document was mailed to the following on the
22 day of August, 1985:

17 Emille Loring
18 Hilley & Loring P.C.
121 4th St. W., Ste. 20
19 Great Falls, MT 59401

20 Lawrence R. Martin
21 Felton & Martin P.C.
450 Hart Albin Bldg.
22 P.O. Box 2558
Billings, MT 59103-2558

23 Suzanne Hov
24
25
26
27
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filed
LincolnSTATE OF MONTANA
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-84

BILLINGS EDUCATION ASSOCIATION,
MEA,

Complainant,

vs.

YELLOWSTONE COUNTY SCHOOL
DISTRICT NO. 2, BILLINGS,
MONTANA

Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

This recommended order addresses the questions of (1) the width and breadth of protected, concerted activities when a labor organization has allegedly solicited, compiled and publicly distributed a survey report, (2) the elements of a public employee's "Weingarten" rights and (3) the public employer's alleged actions to limit its employees access to an elected school board.

Billings Education Association (Complainant, BEA) filed the following charges:

1. Charging Party, the Billings Education Association (BEA), is the recognized exclusive representative of the Defendant's professional employees in its Billings, Montana, school system.

COUNT 1

2. The BEA was receiving a number of complaints about teaching and working conditions in a particular Billings school, Lincoln Junior High School. In order to find the facts, determine if there were any violations of the collective bargaining agreement and, if possible, resolve the situation amicably with Defendant's administration, the BEA conducted a survey among its members in Lincoln.

3. Throughout the process, Defendant's Superintendent, William K. Poston, Jr., was kept informed by the BEA and on February 9, 1994 BEA leadership had breakfast with Supt. Poston and provided him with a copy of the survey report.

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4. Almost a month later, on March 7, 1984, Supt. Poston wrote a letter to BEA President Mark Jones, attached as Exhibit A, threatening disciplinary action against the BEA members involved in soliciting and distributing the survey.

5. The threat to discipline BEA members who have engaged in protected concerted activities is a violation of Section 39-31-401(1) and (3), MCA.

COUNT II

6. As shown in Exhibit A, Superintendent Poston required BEA President Jones to meet with him on March 9, 1984. Although the letter clearly threatens disciplinary action, Supt. Poston denied President Jones' request that he have a union representative with him.

7. An employer's refusal to permit a union representative at an interview the employee reasonably believes may result in discipline is a violation of Section 39-31-401(1), MCA.

COUNT III

8. On or about February 28, 1984 Defendant's Superintendent Poston held a Superintendent's Cabinet meeting, the minutes of which were widely available within Defendant's school system, Exhibit B. At the meeting, according to the minutes, Defendant's agent, the superintendent, took the position that contacting Board members directly would be considered an act of insubordination and would subject staff members to reprimand.

9. Board members are elected public officials and any member of the bargaining unit has a right, protected by the United States and Montana constitutions, to contact elected officials for the redress of grievances. Threatening a reprimand for the exercise of such rights is a violation of Section 39-31-401(1), MCA which protects the Section 39-31-201, MCA rights of employees.

The Yellowstone County School District Number 2 (Defendant, employer) denied any violations of Sections 39-31-401 (1) and (3) MCA. For reasons set forth below I find in this case that Yellowstone County School District did violate Section 39-31-401(1) MCA by trying to stop future Lindein survey reports, Count I; and that Yellowstone County School District did not violate Section 39-31-401(1) MCA as stated in Count II and III. The Board of Personnel Appeals does not have the jurisdiction to hear about the rights and protections of the United States and Montana constitutions.

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1 On August 30, 1984 a hearing was held to determine if
2 the defendant violated sections 39-31-401 (1) and (3) MCA.
3 The hearing was held under the authority of Section
4 39-31-406 MCA and the Administrative Procedure Act (Title 2,
5 Chapter 4, MCA). The parties agreed that the Billings
6 Education Association is a labor organization as defined by
7 the collective bargaining act for public employees,
8 39-31-103 MCA; and that the Defendant is a public employer
9 as defined by the Collective bargaining act for public
10 employees, 39-31-103 MCA. Neither party raised a question
11 of the Board of Personnel Appeals jurisdiction in this
12 matter.

13 Because the Board of Personnel Appeals has little
14 precedent in some areas, I will cite federal statute and
15 case law for guidance in the application of Montana's Col-
16 lective Bargaining Act, Title 39, Chapter 31, MCA (Act). The
17 federal statute will generally be the National Labor Rela-
18 tions Act, 29 U.S.C., Section 151-166 (NLRB) precedent for
19 guidance. State Department of Highways v. Public Em-
20 ployees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974);
21 AFSCME Local 2390 v. City of Billings, 555 P.2d 567, 93 LRM
22 2753, (1976); State of Montana ex. rel. Board of Personnel
23 Appeals v. District Court of the Eleventh Judicial District,
24 598 P.2d 1117, 103 LRM 2297, (1979); Teamsters Local 45 v.
25 Board of Personnel Appeals and Stewart Thomas McFarvel,
26 635 P.2d 1310, 38 State Reporter 1041, (1981).

27 After a thorough review of the testimony, exhibits,
28 posthearing briefs and reply briefs I make the following:

29 FINDINGS OF FACT

30 The employer's first witness's, Ms. Van Valkenberg,
31 testimony will be given credit only to the extent the emp-
32 loyer's first witness's testimony is supported by other

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witnesses' testimony and/or exhibits. Several areas of the first witness's testimony are in conflict with a BEA exhibit. The BEA exhibit is controlling and credible.

1. During the time in question the following sections of school board policy were in effect:

Policy 272F, Line of Responsibility

- A. All personnel shall refer matters requiring administrative action to the administrator in charge of the area in which the problem arises.
- B. When necessary, administrators shall refer such matters to the next higher authority.
- C. Through the Superintendent, each employee of the District shall be responsible to the Board. (District Exhibit 2).

Policy 272F was adopted September 24, 1979 (Seicher, tape 5).

Policy 531A, Student Behavior Code

The parent is expected to cooperate with school authorities and to support necessary disciplinary measures. It is the parent's responsibility to notify the school of any unusual behavior pattern or medical problem that might lead to serious difficulties.

The teacher has primary responsibility for all matters of conduct and discipline in the classroom, in the school building, and on the school grounds. Teachers have authority to:

- deny certain classroom privileges
- use such reasonable measures as may be necessary to maintain discipline
- remove a student temporarily from the classroom.

The principal has the final responsibility for discipline of the students in his building.

It is the responsibility of the principal or his designee to:

- establish and implement rules and regulations for student conduct in his school
- make these policies, rules, and regulations readily available to students and parents
- supervise and support teachers in their obligation to maintain discipline and create an atmosphere conducive to student self-regulation
- impose necessary disciplinary measures including, but not limited to, imposing suspension or recommending expulsion to the superintendent of schools

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1 - defend every individual within the school
2 against arbitrary and unfair treatment.
3 (District Exhibit 5)

4
5 School District Policy 531A gives the school building prin-
6 cipal the right to set discipline policy for that building
7 within the broad guidelines of the policy. (McKenna, tape
8 6).

9 Policy 532F, Student Discipline

10 Each teacher is expected to establish satisfactory
11 student behavior with positive and constructive
12 methods. If a problem is encountered, it shall be
13 referred to the appropriate building administra-
14 tor.

15 The goal of student discipline shall be the dic-
16 tionary usage "self-control or orderly conduct."
17 It is not to be confused with punishment. The
18 goal of discipline is maturity and socially ac-
19 ceptable conduct.

20 If necessary, disciplinary procedures may be
21 established through the cooperation of the par-
22 ents, teachers and the building principal. (Dis-
23 trict Exhibit 5).

24 Policy 533F, Corporal Punishment

25 Where normal efforts to achieve satisfactory
26 student discipline are not successful, corporal
27 punishment may be administered according to state
28 law. (School District Exhibit 5).

29 Policy 637F, Evaluation

30
31 The Board delegates to the Superintendent the
32 responsibility of developing, organizing, and
33 implementing a system-wide program for evaluating
34 the instructional process as one means to ensure
35 quality instruction. Each certified staff member
36 will be evaluated annually, using the forms and
37 procedure contained in the Evaluation Manual
38 approved by the Board. (District Exhibit 4).

39
40 2. The parties renewed a collective bargaining agree-
41 ment covering a period July 1, 1983 through June 30, 1985.
42 The collective bargaining agreement, District Exhibit 1,
contains several articles relevant to the charges.

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1 Article II, Section 2, Appropriate Unit provides among
2 other things that speech therapists be included in the col-
3 lective bargaining unit; and that coordinators are excluded
4 from the collective bargaining unit. I find this to mean
5 that a coordinator of speech therapists is not in the col-
6 lective bargaining unit.

7 Article III, Section 9, Meet and Confer, provides, upon
8 request, the employer shall meet and confer with the union
9 to discuss educational policies and other matters not in-
10 cluded in the terms and conditions of employment.

11 Article III, Section 11, Association Leave, provides
12 that an elected or appointed representative of the union
13 shall be granted leave to attend state, regional and nation-
14 al meetings and conferences; and that the president of the
15 union shall give the superintendent notice at least three
16 days in advance of usage except in cases of emergency.

17 Article XII, Section 1, Grievance Definition, provides
18 that a grievance shall mean an allegation by a teacher,
19 teachers, or association resulting in a dispute or disagree-
20 ment as to the interpretation or application of any term(s)
21 of the agreement.

22 Article XV, Section 6, Teacher Evaluation, Effect, pro-
23 vides that evaluation and evaluation procedures shall be a
24 matter of school board policy and shall not be part of this
25 agreement. Some areas of the Evaluation Procedures are sub-
26 ject to the Grievance Procedures.

27 Article XVI, Section 1, Student Discipline, provides
28 that the school district shall have a policy on student dis-
29 cipline and shall distribute the policy to each teacher at
30 the beginning of the school year.

31 1. In early August 1983, the school district assigned
Carolyn McKennan to the position of Lincoln Junior High
School principal. Before this assignment, Ms. McKennan was
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1 principal for seven years at McKinley Elementary School
2 plus other experiences. Ms. McKennan has been a successful
3 Elementary Administrator (District Exhibit 3). Ms. McKennan
4 knew that her discipline policy was different than other
5 administrators that had been at Lincoln Junior High; that
6 there was some difference on what she viewed as correct
7 discipline for students; and that her view may cause some
8 problems with the staff (McKennan, tape 6).

9
10 4. Lincoln Junior High School is one of five junior
11 high schools in the employer's educational system. Lincoln
12 Junior High School employs about 45 to 47 full time equiva-
13 lent teachers and about 20 support staff.

14 5. During the 1983-84 school year there was a discip-
15 line policy at Lincoln Junior High School. The discipline
16 policy printed in the student-parent handbook was a copy of
17 the school district's discipline code along with examples of
18 expected behavior in the cafeteria, expected behavior when
19 arriving early at school and when the students may be in the
20 building (McKennan, tape 5).

21 At the beginning of the school year, Ms. McKennan, at a
22 faculty meeting, explained her discipline beliefs and values.
23 Ms. McKennan set very few discipline rules such as: if a
24 student runs in a hall for the third time, the student loses
25 his free time privileges for a week. Ms. McKennan believes
26 in only setting discipline rules out of need, not before
27 (McKennan, tape 5).

28 Mark Jones, NEA President, compared the old teacher-
29 student handbook with the 1983-84 teacher-student handbook
30 for Lincoln Junior High School and found the earlier discip-
31 line policy was removed. Mr. Jones agreed that from some of
his talks with the teachers, some discipline policy did
exist at Lincoln Junior High School but the teachers did not

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1 understand the policy or the teachers were confused about
2 the policy where the Lincoln survey report states "student
3 discipline policy - none", the statement may not be accurate
4 (Jones, tapes 3, 4).

5 A second Lincoln student discipline policy was estab-
6 lished in May 1984 (Moxenman, tape 6).

7 6. Starting about the second week of the 1983-84
8 school year, Mr. Jones received several telephone calls from
9 teachers at Lincoln Junior High School about a discipline
10 problem. Mr. Jones advised the teachers to give the new
11 administrator some time to work into a junior high setting.
12 Mr. Jones continued the same advise until November-December
13 1983 (Jones, tape 3).

14 Joyce Butler, Uniserv Director for the Billings area,
15 union business agent, received telephone calls from Lincoln
16 teachers about student discipline problems, teacher eval-
17 ation problems, teachers being pressured and inability of
18 teachers to meet with Lincoln School Administrator. The
19 major problems at Lincoln were teacher evaluation and stu-
20 dent discipline. (Butler, tapes 1, 2; Jones, tape 3).

21 7. All parties agree that the school administration by
22 School Board policy and the Collective Bargaining Agreement
23 has the responsibility for establishing student discipline
24 and teacher evaluation (Butler, tape 1; Jones, tape 3;
25 Poston, tape 7).

26 Ms. Butler states that student discipline and teacher
27 evaluation absolutely does have an effect on the teachers'
28 working conditions (Butler, tape 2).

29 The record contains no other testimony about student
30 discipline and teacher evaluation compared to working condi-
31 tions. Taking into account School Board policy 531A and
32 532F which states the teacher has primary responsibility for

1 all classroom discipline, and taking into account School
2 Board policy 637P which provides for an evaluation of tea-
3 chers to ensure the quality of education, I cannot logically
4 disagree with Butler's statement. I cannot logically find
5 the teacher has primary job responsibility for student
6 discipline on one hand and the same primary job responsi-
7 bility for student discipline on the other hand not to be part
8 of working conditions. I find that student discipline and
9 teacher evaluation does have an effect on the teachers'
10 working conditions.

11 8. Before the survey and the survey report, the
12 Lincoln teachers tried to correct the problem at the school.
13 Because of past acquaintances, Karen Lynch, a Lincoln tea-
14 cher, tried to talk to Carol Chaffain, a Lincoln administra-
15 tor, about the Lincoln problem. Ms. Lynch testified that
16 the Lincoln teachers specifically tried to talk to the
17 Lincoln administration about the problems; that the Lincoln
18 teachers found the doors closed and the walls up to any
19 discussion; and that the Lincoln teachers were very frus-
20 trated (Lynch, tape 8).

21 Mr. Jones stated that the meetings to correct the
22 Lincoln problem were fruitless; that the Lincoln adminis-
23 tration's doors were closed to problem-solving; that the
24 Lincoln teachers were not getting any satisfaction by talk-
25 ing with the Lincoln administration; that the Lincoln tea-
26 chers had made an effort to make the Lincoln administration
27 aware of the problems; and that he thinks the Lincoln tea-
28 chers made a reasonable effort to solve their problem short
29 of the survey report (Jones, tape 4).

30 When asked if a committee, a group of teachers, or a
31 BEA representative before January 26 ever asked her to
attend a meeting to discuss the problems of the type in the

1 survey report. Ms. McKennan answered no. When asked if she
2 would have attended such a meeting, Ms. McKennan answered
3 she may have but she had some concerns about such a meeting.
4 Later, the record reveals that Ms. McKennan was approached
5 about a faculty meeting where the teachers could just stand
6 up and air their grievances. Ms. McKennan was somewhat
7 uncomfortable with this type of meeting and would have
8 preferred a meeting on a one-to-one basis or with a small
9 group of teachers (McKennan, tape 6).

10 Dr. William Poston, superintendent of Billings schools,
11 knew about the problems at Lincoln mid-fall 1983. Ms.
12 Butler informed Dr. Poston about the problems and stated she
13 was going to gather additional information and share the
14 information with him. Dr. Poston encouraged input from
15 others including teachers (Poston, tape 6).

16 9. Late November, Mr. Jones talked to Ms. Butler
17 about the problems at Lincoln. Mid-December the teachers at
18 Lincoln requested a BEA grievance training meeting. Mid-
19 December, a meeting was scheduled for the Lincoln teaching
20 staff for January 26, 1984. A grievance training meeting is
21 a meeting to explain to the teachers what a grievance con-
22 sists of and how to proceed with the filing of a grievance
23 (Butler, tape 2).

24 10. About January 23, 1984, a Lincoln teacher was in-
25 volved in a corporal punishment incident with a student.
26 Ms. McKennan called Dr. Poston about the incident. Dr.
27 Poston directed Ms. McKennan to remove the teacher from the
28 classroom and put a substitute teacher in the classroom. On
29 January 24, Dr. Poston called Ms. Butler about the incident
30 and asked Ms. Butler to join him in a meeting with the
31 teacher about the incident. Ms. Butler indicates that
32 rumors were rampant about the Lincoln teacher. The incident,

1 the removal of the teacher from the classroom probably with-
2 out pay and the Lincoln administration's lack of support
3 for the teachers in disciplining students. From the meet-
4 ings between Dr. Poston, Ms. Butler and the Lincoln teacher
5 over the corporal punishment incident, the Lincoln teacher
6 returned to his classroom with full pay and without any
7 reprimand. Ms. Butler judged the corporal punishment inci-
8 dent was handled well, with good results and with no grie-
9 vances (Butler, tapes 1, 2; Poston, tape 5).

10 11. Some time during the meetings over the corporal
11 punishment incident, Ms. Butler informed Dr. Poston that
12 because of the incident and discussion with others, the
13 January 26 meeting changed from a grievance training meeting
14 to a meeting to find out exactly what the problems were at
15 Lincoln and to listen to the concerns the teachers had. Ms.
16 Butler stated that the teachers wanted something more than
17 to know how to file a grievance; that the teachers wanted to
18 know what they could do about the problem; and that she did
19 not know specifically what the problems were. During this
20 time, Ms. Butler talked with about ten different Lincoln
21 Junior High School teachers. Ms. Butler informed Dr. Poston
22 that she was going to survey the Lincoln teachers to find
23 out what the problem was; that she would ask the teachers to
24 suggest ways of taking care of the problem; and that she
25 would compile the information into a report. Also, to a
26 small extent Ms. Butler used the January 26 meeting to see
27 if there was any violation(s) of the collective bargaining
28 agreement. Separately, Ms. Butler told both Dr. Poston and
29 Mr. Jones about the questions on the survey. Dr. Poston
30 told Ms. Butler that he needed specific information about
31 the problems at Lincoln. For example: if non-arrival of
equipment was the problem, he needed to know what equipment

1 did not arrive, what date, for whom, for what activity and
2 who failed to fill the order. Dr. Poston stated he needed
3 the specific information in order to do anything about the
4 problem. Also during one of the meetings Ms. Butler and Dr.
5 Poston scheduled a breakfast meeting for February 9 to
6 review the result of the Lincoln teacher meeting of January
7 26 (Butler, tapes 1, 2; Jones, tape 3, 4; Poston, tape 6).

8 12. During one of these meetings before January 26,
9 Ms. Butler told Dr. Poston that the BEA was extending an
10 invitation to the school administration to work together to
11 solve a problem. Dr. Poston accepted. Ms. Butler felt that
12 she had a commitment from the school administration to work
13 together (Butler, tape 1).

14 13. Mr. Jones and Ms. Butler had a meeting with about
15 35-38 Lincoln Junior High teachers on January 26 in the
16 music room of the Lincoln school.

17 After some introductions and statements from Ms. Butler
18 and Mr. Jones, all the parties at the meeting had an open
19 discussion of the problems and what actions should be taken.
20 For about 45 minutes teachers at the meeting spoke about
21 their problems at Lincoln Junior High school. The tone of
22 the meeting was agitation (Bonk, tape 5; Van Valkenberg,
23 tape 4; Jones, tape 3).

24 Ms. Butler informed the teachers that because of the
25 corporal punishment incident the nature of the meeting had
26 changed; that a survey was developed; that only the informa-
27 tion from the survey would be used without the optional
28 signature but a signature would be helpful in locating the
29 person; that only Mr. Jones, a secretary, and herself would
30 see the survey report; that they pointed out the report
31 should be kept within Lincoln as much as possible; that she
32 had the confirmation from the school district that the

1 school district would work with BEA; and that from the
2 survey, a written report would be prepared for Dr. Poston
3 and the BEA.

4 As per Dr. Poston's request, Ms. Butler informed the
5 teachers that specific information about the problem was
6 needed (Butler, tapes 1, 2; Jones, tape 3; Van Valkenberg,
7 tape 5). Ms. Butler instructed the teachers when addressing
8 the question of constructive recommendations to remedy the
9 problem to answer in a constructive and realistic manner.
10 Ms. Butler further told the teachers that recommendations
11 are limited. For example: we cannot say the School Dis-
12 trict must do this or that and we cannot say the School
13 District must hire or fire so and so (Butler, tapes 2, 8).

14 The participants at the meeting talked about alterna-
15 tive courses of action if the survey report did not produce
16 any action from Dr. Poston. The talk about alternative
17 courses of actions were: (a) a faculty letter to the Lincoln
18 parents, (b) neighborhood coffee klatches with the parents,
19 and (c) informational picketing (Bonk, tape 5; Van Valkenberg,
20 tape 4).

21 The majority of the Lincoln teachers said they wanted a
22 copy of the survey report. Ms. Butler agreed. Mr. Jones,
23 Ms. Butler and the teachers talked about the impact a survey
24 report would have on the school mill levy if not done pre-
25 perly. The teachers did not want everyone to know about
26 their problem. Ms. Butler was aware of some of the comments
27 she would receive on the survey forms. Mr. Jones saw a copy
28 of the survey questions before the meeting (Butler, tapes 1,
29 2; Jones, tape 3; Lynch, tape 8);

30 14. Near the end of the meeting, the following survey
31 form was passed out:

LINCOLN JUNIOR HIGH

Faculty Survey

January 26, 1984

SURVEY

1. What is the total number of years of your teaching experience?
_____ (Include the 83-84 year)
2. How many years have you taught in SD #2? _____
3. What was the first school year that you taught at Lincoln Junior High? _____
4. In what other schools in SD #2 have you taught?
5. What is your major concern(s) with your present teaching assignment at Lincoln?
6. What constructive recommendations would you propose to remedy the present situation?

(Optional): Name _____
Home phone _____
(SEA Exhibit 1)

The completed survey forms were collected as the meeting adjourned.

15. Ms. Butler first did a demographic sort to the completed survey. Ms. Butler instructed her secretary to do a verbatim listing of the replies to questions five and six. The only exception to the verbatim listing of the replies was in cases where the anonymity of the teacher would be jeopardized. The Lincoln teachers were afraid of reprisals if any teachers could be identified from the survey report. Ms. Butler verified a few of the replies to questions five and six of the survey report. Mr. Jones verified one item

1 in reply to questions five and six - lack of discipline
2 policy by comparing handbooks. (Butler, tape 1; Jones, tape
3 3).

4 Some of the Lincoln teachers did not know their replies
5 to questions 5 and 6 would be reported verbatim (Bonk, tape
6 5; Van Valkenberg, tape 4).

7 16. About January 31, Dr. Poston called Ms. Butler and
8 asked if Gary Rogers, Ms. McKenna's immediate supervisor,
9 could join the February 9 breakfast meeting. Ms. Butler
10 agreed (Butler, tape 1).

11 17. Some time between January 26 and February 9, 1984,
12 the teachers at Lincoln Junior High School had second thoughts
13 about their comments on the survey report. The Lincoln
14 teachers were scared of the repercussions. Some of the
15 teachers were trying to undo what had been done. A group of
16 Lincoln teachers wanted the survey report destroyed. Mr.
17 Jones was at a Lincoln teachers meeting where the teachers
18 talked about the appropriateness of a survey report going to
19 Dr. Poston. The Lincoln teachers made the decision about
20 this question. The Lincoln BEA building rep polled the
21 Lincoln teachers about giving the survey report to Dr.
22 Poston. The poll was tied. The giving of the survey report
23 first to Ms. McKenna, then to Dr. Poston, was okay with Ms.
24 Lynch and the majority of the Lincoln teachers. (Jones,
25 tapes 3, 4; Lynch, tape 8).

26 18. Ms. Butler may have given Dr. Poston a rough draft
27 of the completed reply to questions five and six on about
28 February 3, 1984. Ms. Butler told Dr. Poston that the
29 Lincoln administration was going to need a lot of support
30 from his office. Dr. Poston testified that he did not get a
31 rough draft copy (Butler, tape 1; Poston, tape 6). (NOTE:
32 we do not need to resolve the question about Dr. Poston re-

1
2 receiving a rough draft February 3 because this fact would not
3 change the results of this recommended order. The same
4 applied to the question, did Dr. Poston see a copy of the
5 completed report before February 9).

6 On February 6, Ms. Butler had a social lunch with
7 school board member Ellen Allwine and a second lady. This
8 social lunch was scheduled a month earlier and was not
9 because of the Lincoln Junior High School problems. The
10 ladies had some conversation about the amount of cooperation
11 between the school administration, the BEA and Ms. Butler's
12 office. Ms. Butler told the other ladies that she was very
13 pleased with the amount of cooperation between the parties.
14 Ms. Butler cited the invitation to work together and the
15 upcoming survey. The school board member asked if she could
16 have a copy of the survey report. Ms. Butler replied that
17 the decision to give her a copy would be made by the BEA
18 (Butler, tapes 1, 2).

19 Ms. Butler visited Lincoln Junior High School some
20 time before February 9. The Lincoln teachers informed Ms.
21 Butler that the Lincoln teachers wished to handle the prob-
22 lem within the Lincoln school as much as they could. The
23 Lincoln teachers wanted to give a copy of the survey report
24 first to the Lincoln administration. The Lincoln teachers
25 picked a committee of three Lincoln teachers to give a copy
26 of the report to Ms. McKennan at the end of the school day
27 of February 8 (Butler, tapes 1, 2; Jones, tapes 3, 4).

28 Ms. McKennan received her copy of the report late
29 February 8. Ms. McKennan phoned Mr. Rogers about the report
30 later February 8 (McKennan, tape 6).

31 Dr. Poston, Mr. Jones, Ms. Butler and Mr. Rogers
32 attended the February 9 breakfast meeting at a public res-
33 taurant. The BEA gave a copy of the survey report along

1 with a cover letter to Dr. Poston and Mr. Rogers. The above
2 individuals had some general conversation. Dr. Poston told
3 Ms. Butler and Mr. Jones that the administration at Lincoln
4 Junior High had got a copy of the survey report the night
5 before; and that the Lincoln administration was upset.

6 Ms. Butler and Mr. Jones informed Dr. Poston and Mr.
7 Rogers that the Lincoln teachers wished to work on the prob-
8 lems internally.

9 Mr. Jones informed Dr. Poston and Mr. Rogers that the
10 teachers at Lincoln Junior High School would be getting a
11 copy of the report the next day. During this timeframe, Dr.
12 Poston was told the school board members would be getting a
13 copy of the survey report. Dr. Poston had no objections to
14 this distribution. After glancing through the survey report,
15 Mr. Jones told Dr. Poston that we are not passing judgement
16 on the accuracy of this report; and that we are just giving
17 you a copy of the information we got. Dr. Poston asked Mr.
18 Jones if he was recommending a termination or discipline.
19 Mr. Jones replied that his role was to give the school
20 administration the information; that he was not recommending
21 anything; and that it was up to the school administration to
22 do as they see fit. Mr. Jones still stands by that posi-
23 tion.

24 At this meeting, Dr. Poston did not say anything about
25 disciplining anyone because of the survey report. When Dr.
26 Poston left the breakfast meeting, he had the impression he
27 had to get involved in Lincoln and take some sort of action.
28 After the breakfast meeting, Dr. Poston, Mr. Rogers and Ms.
29 McKennan had a meeting at the Lincoln school to discuss the
30 survey report (Butler, tape 1; Jones, tapes 3, 4; Poston,
31 tape 6).

1 The BEA believed that at the February 9 meeting, the
2 parties were using the provisions of Meet and Confer, Article
3 III, Section 9 of the Collective Bargaining Agreement with-
4 out making a formal request to meet and confer (Butler, tape
5 1). The record contains no other information on Meet and
6 Confer. Ms. Butler's statement is controlling.

7 22. The cover letter and part of the survey report
8 states the following:

9 Attached is a report on the general findings relative
10 to situations at Lincoln Junior High School.

11 A survey was given to each faculty member in attend-
12 ance at a meeting on January 26, 1984. That survey is
13 included in the report.

14 This report is shared with you by the Billings Educa-
15 tion Association as a demonstration of willingness on
16 the part of the BEA to work with district administra-
17 tion to improve conditions at Lincoln. The report
18 includes some recommendations. These suggestions are
19 made in hopes that the administration will be agree-
20 able to also make recommendations.

21 The BEA truly desires to work with the administration
22 on a cooperative basis to bring about positive develop-
23 ments among the faculty, administration, students, and
24 parents at Lincoln Junior High School. Thank you for
25 your assistance and cooperation with these critical
26 concerns.

27 (BEA Exhibit 2)

28 SURVEY REPORT - LINCOLN JUNIOR HIGH SCHOOL

29 On January 26, 1984, a meeting with the faculty of
30 Lincoln Junior High School was held with Mark Jones,
31 President of the Billings Education Association, and
32 Joyce Butler, NEA Uniserv Director. There were thirty-
33 eight members of the Lincoln faculty present at the
34 meeting. Of these, thirteen teachers are non-tenured,
35 and twenty-five are tenured. Total teaching experi-
36 ence of individual teachers present at the meeting
37 ranged from first year teachers to a teacher with
38 twenty-three years of experience. The specific break-
39 down is shown on the survey form which is included in
40 this report. These thirty-eight teachers collectively
41 bring experience to Lincoln from twenty-six other
42 schools in Billings School District #2. These schools
43 are listed on the back of the survey. This report is
44 a result of the discussion that took place at the
45 meeting and the information that was provided on the
46 survey form completed by the thirty-eight faculty mem-
47 bers in attendance.

GENERAL CONCERNS:

During the group discussion, several general statements of concern were outlined by members of the faculty. These concerns are:

1. Constructive vs. negative criticism.
2. Avoid criticism of teachers in front of student.
3. Teachers should be supported when disciplining students - not placed on the defensive.
4. Selective support of teachers on the basis of method of classroom control used.
5. Criticism of teachers in front of students and parents is common.
6. Unofficial Evaluation being kept.
7. Evaluation procedures not being followed: i.e. pre-conference, post conference (timely).
8. Excessive observations without follow-up.
9. M. Hunter method substituted for district policy.
10. No policies regarding student behavior.
11. Minimal communication.
12. Teacher input not welcomed.
13. Parent Advisory Committee calls the shots.
14. Policy on Discipline has been removed from student handbook.
15. General inconsistency in dealing with students and teachers (favoritism).
16. Changes in assigned responsibility without warning, rationale or input from affected teachers.
17. Refusal to clearly define rules, procedures, consequences, etc.
18. Teachers are denied the authority to carry out supervisory responsibilities.
19. Lack of administrative presence during lunch, hall and bus area.
20. Concern about the numerous and frequent changes in administration and policies.
21. Administrator actually encouraging law suits.
22. Reprimands issued when teachers try to break up fights.

1 RECOMMENDATIONS FROM THE FACULTY:

2 Also during the discussion, faculty members were asked
3 to identify specific recommendations to remedy the
4 present situation. These recommendations are as
5 follows:

- 6 1. There should be teacher input in the Handbook
7 including defining rules and establishing
8 consequences.
- 9 2. Set standards which are consistently applied to
10 the following:
 - 11 A. Discipline
 - 12 B. Teacher observation and evaluation
 - 13 C. Follow up on observations
- 14 3. Provide more administrative support in guarding
15 student safety - particularly around school
16 buses.
- 17 4. Change in administration.
- 18 5. Cease discrimination against men teachers. The
19 perception exists that male teachers get poorer
20 evaluations and less support.
- 21 6. Discontinue harassment of non-tenure teachers.

22 To this list, the following recommendations are also
23 offered.

24 RECOMMENDATIONS:

- 25 1. Provide adequate in-service training on M.
26 Hunter methods and theories for those teachers
27 who are being evaluated by those standards.
- 28 2. Readminister the Purdue Inventory to Lincoln
29 staff. At the time faculty completed this
30 survey, they were unaware of who building level
31 administrators were. This survey could shed
32 light on several key issues: teacher rapport
33 with principal, rapport among teachers, teacher
34 load, curriculum issues, teacher status, satis-
35 faction with teaching, and school facilities
36 and services.
- 37 3. Organize a faculty, administration, parent com-
38 mittee to review discipline problems and develop
39 specific discipline policies that will be es-
40 tablished for the entire school. These poli-
41 cies/rules should be printed for every student
42 and teacher. Parents should also be made aware
43 of these policies/rules.
- 44 4. Faculty members should be allowed to request
45 administration to schedule "issue(s) of concern"
46 on agenda of regularly scheduled faculty meet-
47 ings. This would enhance communication between
48 teachers and administration and among teachers.

5. Teachers who are new to the building (and especially the district) could be assigned a "buddy" teacher during their first year at the school. This would provide for more positive teacher interaction as well as assist new teachers in locating necessary equipment and supplies.
6. Minimize PA announcements which are disruptive to classroom procedures. Make all announcements over PA at one time each day, i.e., the last five minutes of first period. Have all daily announcements printed and run off and placed in each teacher's mail box one-half hour before student day begins. Each teacher can post these announcements in their classroom.
7. Conduct a building meeting to review the District staff evaluation procedures.
8. Provide for regular and consistent teacher representation on Parent Advisory Committee. Follow PAC meetings with written reports to the entire faculty.

Comments on Items #5 and #6 of the survey are itemized in the following pages of this report.

CONCLUSION:

Overall, there is a negative spirit that dwells at Lincoln Junior High School. In general, the situation there is one where faculty members feel that they have no ownership or buy-in in the operation of the school. There is very little effective communication between teachers and administrators or amongst the teachers themselves. Feelings of fear, reprisal, and antagonism seem to reign over the staff. All of this distracts from teachers performing at their best.

Cooperation between School District #2 administration and the Billings Education Association is needed to provide positive development for maximum utilization of the talents of staff and administration.

5. What is your major concern(s) with your present teaching assignment at Lincoln?

- No school discipline

a. We have children in this school at 7:00 in the morning until God knows when. Children refuse to leave the school at night. Talked to McKenna and she did not seem to see anything wrong.

b. A child hit me - I took him to the counseling office. I was called in by McKenna and Chatlain and asked "What did you do for that boy?"

45 (continued)

c. Obscene tee shirts or ones advertising liquor and beer are "OK". McKennan will be the one to determine whether they are "appropriate or not."

- The teacher is guilty! Teacher is very seldom backed.
- Lack of discipline.
- McKennan and Chatlain are very abusive of Bill Jull.
- Teacher is wrong first - will listen later.
- No interaction at faculty meetings. Programs set up and controlled by Principal.
- No support for teachers concerning students.
- Student punishment is: out of class 1+ periods and being talked to. Kids think this is a joke.
- The kids are getting more and more rowdy and they show no respect for teachers or each other (halls messy, running, fighting - all grades dropped)
- Discipline policy varies from child to child - depends on who child is and who parents are.
- Some teachers are treated differently than others. If they use "Assertive Discipline" there is more follow up. Other teachers are harrassed.
- I have been evaluated - no write up yet. It has been 15 days.
- There seems to be lack of support from the administration. Carol Chatlain does not take a stand on how to handle discipline. She tends to think that notification of others is the best way (ex: parole, parents, or just to talk). I feel parents and students have more control over teachers.
- The administration seems to think that students are always right.
- The lack of taking a stand or making rules is ridiculous. Students allowed to wear anything and eat anything anytime. Seems to be a little hoodlum community. I've never worked under anything or anyone like Carol Chatlain. A concern of mine is teacher morale. I hate seeing so many people unhappy. We feel like they really don't think we know anything.
- No pre-conference or follow up on evaluation. No written evaluation.
- Lack of administrative tact in working with staff.
- Lack of stern/consistent discipline.
- I feel overwhelmed by all the new things I'm faced with.
- We really need new English materials.
- I haven't been evaluted in 2 years - or yet this year.
- Also - the student has first say over the teacher. The teacher must justify actions in front of students or to students.
- Lack of communication from office to classroom.
- Inability to see principal without making appointment.
- Treated like a little kid.

#5 (continued)

- Lack of administrative support - all you get is the run-around.
- Problem with refusing to make schedule changes which affect my teaching ability.
- Illegal placement of students.
- I have not been evaluated and am concerned because of what has been done in other evaluations.
- Extra assignments not covered by stipends.
- Within this building seniority is meaningless. Appointments are by who you get along with. No one has any expertise but our administrator regardless of background. Some of our teachers have worked hard to develop expertise and should be recognized as such.
- Teachers are belittled, criticized by administrators in the presence of parents and students.
- I feel that the students and Lincoln are not getting the best education.
- This school seems to be a mess. We have had 4 interruptions of the school day in 4 days.
- No one seems to know what's going on.
- Faculty meetings are a waste of time - they should be more informative and not instructional.
- Lack of administrative support.
- Antagonism by administrators.
- Undermining discipline by administrators.
- The elimination of rules (gun, beer shirts, shirts with nasty comments, etc.)
- Intimidation of non-tenured staff.
- Threats of lawsuits by administrators unnecessarily.
- No teacher input on policies.
- Lack of discipline.
- Lack of concern for human beings' feelings.
- No communication.
- Definite partiality.
- Avoidance of problems at hand.
- Never any notices about future events.
- Students are in the building at all hours - the girls' locker room is a complete mess with writing all over the walls.
- Lack of support by administration.
- Repeated criticism by administration.
- No administration back up with discipline problems; no consistency in office policy concerning discipline (student attendance, swearing in halls, etc.)
- Administrators criticize teachers in front of students.
- Administrators doubt teacher's word when told of conflicts between teachers and students.
- Observation by administrator with no follow up conference till several weeks later.
- We are sadly lacking materials at Lincoln. I requisitioned a file cabinet in September; still have received no file cabinet. Administration seems unconcerned about lack of materials.
- Students' rights over-shadow teachers' rights.

#5 (continued)

- Students swearing, roughhousing in halls is worse here than in any building I've ever taught in. Gun all over walls, floors, etc.
- Assertive discipline is used against teachers.
- Principal never patrols the halls.
- Principal rarely available for personal conference with teachers.
- No school rules - they were thrown out at the beginning of the year by our current "leader".
- Lack of administrative support - too often I've sent students to the office and had nothing done.
- Inconsistent support - sometimes there is support, sometimes not - it seems that the child and who his parents happen to be influence this.
- Different levels of administrative support for different teachers - those using Chatlain's pet assertive discipline mode are able to send students to the dean with 4 checks, I have been told I may not.
- No teacher input - ex. minj-courses set up by principal - first students were surveyed, then teachers who were expected to teach these after school courses were notified - still given no guidelines for course goals.
- No use of forms and procedures by administrators - I was assigned a new student Monday, January 23, by Chatlain - she still has not made the transfer official by filling out and distributing the required form - the counselor had no information on the schedule change, either - I had to track "Ms. C" down to find out what was going on.
- Lack of classroom experience on part of administrators - Chatlain has none, McKenna only in elementary special ed.
- Lack of support for teachers with discipline problems.
- Lack of organization and communication - teachers are not told of changes with advance notice - both meetings and changes in the class day are announced at a late time.
- Teachers have no input; the school is run (when some communication is used) by the office. Consideration or common courtesy is lacking.
- The student's voice is heard first before having a discussion with the teacher - regarding any problems with students.
- Lack of consistent discipline policies.
- One way communication: I feel I am approached with an "I'll talk, you listen!" kind of attitude. My point of view is not respected. I am often interrupted when I'm sharing my opinion or concerns.
- Problems are minimized or ignored - discipline, garbage in halls, student behavior in assemblies.
- Inconsistencies in handling of discipline.
- Lack of professionalism among administrators (Dean of Students).
- "Unofficial evaluations" - impossibility of principal for discussion or conferences.

#5 (continued)

- Policies of current administration has created a lack of respect toward teachers and as a result, an increase in discipline problems. No input allowed - lack of organization.
- My input is/was not accepted in establishing school policy at Lincoln. A good school has a policy that is agreed upon by administration and teaching staff.
- Constructive assistance to teachers having difficulties is needed.
- Inconsistency regarding school discipline policy.
- Inconsistency in handling discipline and school matters.
- The morale of the teachers.
- The lack of backing for teachers who find a need to discipline students. In fact the teachers are verbally put down in the presence of students and teachers. If the teacher is wrong in discipline matters a private discussion should take place between the teacher and administrator.
- Lack of or not enough communication.
- No cohesiveness between administration and teachers.
- What the principal says she will do - never happens.
- Lack of up-to-date materials.
- Lack of discipline among students - noise, pushing, gum-chewing, etc. in halls and classes.
- Communication between faculty and administration - lack of.
- Discipline policy - none.
- Lack of support for teachers in difficult situations - always side with students and parents against teacher.
- Poor (no) communication between staff and administration. The administration is autocratic, they continually take the student's side on every issue thus putting the faculty on the defensive on every issue. The dean is continually guarding the student's rights and never regards the right of the teacher.
- Our evaluations do not follow the contract, no pre-conference offered or written evaluation within 10 days.
- Too much theory from administration. No common sense.
- The world's worst and most arbitrary discipline policy.
- Discipline problems. No standard foundation or policy for student problems.
- Evaluation process is not being followed as according to the SD #2 contract (ie: No pre-conferences no option given to me!)
- Dissatisfaction among staff and administration. Seems to be mutiny on the horizon! General unrest.
- Discipline in school seems to lack direction and focus. Intent is good but it seems all talk.
- Although this is not my problem at this writing - I feel that many of my peers have been very critically evaluated - unjustly.
- Process and follow through of discipline.

45 (continued)

- Failure of communication between administration and staff.
- I am very dissatisfied with the lack of set rules, policies, and consequences for students by the administration. Example - Students may chew gum in classroom (not mine).
- Students have candy - wrapper remains are found all over the school.
- On occasions when I send students out of the classroom for disciplinary action, the Dean has either been unavailable, door closed, on the telephone etc. Just today she told me to handle the situation myself. Chatlain does not have the ability to resolve student-teacher problems. She is not even supportive of the teacher. I have been in meetings where she quizzed teachers, put them down for certain actions - in front of staff. I personally do not find her effective in handling student disruptions. Her little chats with students do not work.
- Student behavior in the halls: swearing, running, fighting, slamming lockers, rude and disrespectful to teachers. Teachers try to be visible and are, it's just that nothing happens to students when they are taken to the office for these offenses. Heck, the (students) can wear beer t-shirts, wear walkmans and carry portable stereos all over the school. The students run this school.
- Kids have rowdy hall behavior.
- Lack of visibility on the part of the 3 administrators.
- Teachers are afraid - but kids aren't. They don't fear being sent to the office.
- Kids all over town know about the "mess" at Lincoln.
- Erratic method of schedule changes.
- Assemblies - lack of respect for those on the stage.
- Messages and notices to teachers are often confusing - daily schedule changes are often made at the last minute and are given over the P.A.
- Floors of halls - always messy with candy and gum wrappers.
- Writing on the bathroom walls.
- Counselors are forced to do the vice principal's job of scheduling.
- No one keeping the kids out of the hall before 7:30 a.m.
- Kids allowed to remain in building after school.
- Inconsistent applying of rules.
- Some teachers are treated well, some are treated very poorly.
- Lack of respect of counselors by administration in cmt.
- Kids side taken instead of teachers.
- Need more equipment in the classroom - file cabinets, teacher desk, more tables.
- No pre-conference before evaluation. No follow up after evaluation to see that suggestions for improvement have been fulfilled.

#5 (continued)

- Lack of (strong) discipline.
- Lack of positive communication with administration.
- Student rights over teacher rights.
- Need some positive reinforcement - less of a negative evaluation approach. Says one thing verbally and written way too negative.
- Not enough faculty - administration communication.
- More communication on policy.
- Administration not using the faculty resources of ideas.
- I believe the administration is using the problems they created in discipline as the teacher's creation.
- I feel that the evaluation process is poor. Evaluation does not follow contract. I feel discriminatory practices against myself in my evaluation.
- Discipline is at a standstill.
- Students have no regard for following rules.
- Teachers do not have any rights.
- Administrator should be held accountable to teachers to give expectations, equal rights and positive support.

6. What constructive recommendations would you propose to remedy the present situation?

- Make Mr. Jull Principal.
- Set policy on discipline for all - equally.
- Solid backing for all teachers not just favorites or those using "Assertive Discipline".
- Get rid of Chatlain!!
- Have a stricter discipline policy.
- Have stricter consequences for students' misbehavior. After school suspension obviously isn't working.
- Recommend Bill Jull head man. The other two - remove and hire someone that can be good administration to both students and teachers.
- How about another form filled out by Lincoln teachers that was assembled the first PIR day last fall. We could not answer most of them because we didn't know administrators.
- We need a chance to air our concerns about the problems.
- We need to know just where we stand - discipline, etc.
- Better inservice for new teachers about procedures at junior high.
- Weekly staff newsletters detailing meetings, procedure for homework, etc.
- Cut down evaluating others as much - let's treat everyone equally.
- Need to look at an administrator who understands the junior high setting and can be supportive of teachers within legal rights of the law. Teachers are expected to be positive and use assertive discipline and give students equal rights.
- Transfer me to a senior high.

#6 (continued)

- Get communications going specifically in the area of discipline.
- Make Mr. Jull Principal.
- Fire Ms. Chatlain.
- Transfer Mrs. McKennan to elementary.
- Bill Jull should be principal.
- Parents should be informed.
- A principal who will support teachers at Lincoln.
- Bill Jull made principal.
- Bring in some strong and knowledgeable administrators to replace McKennan and Chatlain.
- Change the administration.
- I feel our present administrators are not qualified to handle a junior high; therefore, I feel the only solution is for a change in administration (Dean and Principal).
- Need a definite set of rules.
- Open communication from the administration at this school. We have never had this. All we have are directives.
- Firm policies concerning the above matters. I don't know where the administration stands!
- Treat all teachers in a positive manner - not be friendly to some and unfriendly to others.
- Work with teachers - not against them.
- Don't tell people they have a right to sue teachers.
- I really don't know.
- Tighten rules and enforcement.
- Allow teachers to assign detention without going through a dean.
- Reassignment of Carol Chatlain. She should not be dealing with personnel.
- Faculty committee should meet with Mrs. McKennan. She should agree to listen and take actions on their suggestions.
- I wish I knew - my "gut-level" feeling is new administration.
- Weekly bulletin.
- Discipline policy established for school dressing:
 - a. Obscene T-shirts
 - b. Hall behavior
- Work with teachers - not against them.
- Avoid criticism of teachers in front of students.
- Send Chatlain to some other place.
- Clue McKennan in, force her to listen.
- Keep Mr. Jull.
- Cooperative attitudes and actions on part of administration toward enforcing an effective discipline policy. We need to see faculty and administration working at enforcing rules! Administrators must lead in a big visible way.
- Evaluations are highly critical and not constructive. Seem to be written for the purpose of demonstrating observer's ability to find fault. Where is the help we need to become a better teacher?
- Stronger discipline by administration especially in Dean of Students or change in Dean (ASA).
- Availability of communication with administration.
- Consistent policies in regard to student problems.
- Remove the dean.

1 #6 (continued)

- 2 - Put a strong disciplinarian MALS in leadership
3 position. This I see as crucial.
4 - There should be more consistent discipline from
5 the main office and more backing of teachers
6 when they administer discipline.
7 - Stricter rules with enforcement.
8 - Get administration to talk to their staff and
9 use their resources.
10 - Change of administration, with the exception of
11 vice principal.

12 (Exhibit A, Attached to School
13 District's Response)

14 The substantive part of the above survey report con-
15 tains some 230 numbered and highlighted entries. The num-
16 bered entries are general conclusions of the survey report.
17 Of the 36 numbered entries only one states a "change in
18 administration". That is one out of 36 or 2.3%. Of the 140
19 verbatim highlighted responses to question #5, none of the
20 statements make any reference to a change in administration.
21 Of the 56 verbatim highlighted responses to question #6,
22 some 19 entries make some type of reference to a change in
23 administration. That is 19 out of 56 or 33.9%. Overall out
24 of some 230 entries, only some 20 entries make some refe-
25 rence to a change in administration - 8.7%.

26 23. Ms. Butler and Mr. Jones's purpose in the survey
27 report.

28 Ms. Butler states the purpose of the survey report was
29 to identify specific problems, bring the problems forcefully
30 with effect with impact to the administration so we could
31 get some attention and force to see what could be done
32 (Butler, tape 2). Later Ms. Butler states the purpose of
33 the survey report was to gather information on what the
34 problems were and to try to get some constructive solutions
35 (Butler, tape 3). When asked if part of the desire of the
36 Lincoln community was to eliminate those Lincoln administra-

ters, Ms. Butler answered some of the people did feel that way and agreed that a thread of eliminating the Lincoln administrators ran through the survey report (Butler, tape 2). Ms. Butler denied that the objective of the survey report was to get rid of the Lincoln administrators (Butler, tape 3). Butler also stated the survey report was to find out if there was any violations of the Collective Bargaining Agreement. Ms. Butler had done similar survey reports in other schools, in other situations. No grievance was filed over the Lincoln problems or on information from the Lincoln survey report (Butler, tape 1).

Mr. Jones states the reason for the survey report was to get a clear handle on the Lincoln problem. Mr. Jones agrees that the survey report contains inflammatory nonconstructive items (Jones, tape 4).

Because Mr. Butler had done survey reports in other schools in other situations, I find Mr. Butler with some input from Mr. Jones to be the chief engineer behind the survey report.

Looking at (a) Mr. Jones's above statements, (b) Mr. Jones's "not recommending any termination or discipline" statement of February 9, before any dispute, (c) Ms. Butler's above statements, (d) Ms. Butler's before January 26 invitation to work with the school district's statement to Dr. Paxton, (e) Ms. Butler's instructions to the teachers about survey recommendations on January 26, (f) Ms. Butler's comments to school board member Allwise on February 3, (g) Ms. Butler's report cover letter of February 9, and (h) the last sentence in the conclusion of the survey report, I find Ms. Butler and partly Mr. Jones's purpose in the survey report was to improve the teachers' working conditions in the area of student discipline and teacher evaluation plus

1 to a minor extent to gather additional specific information.
2 I do not find Ms. Butler and Mr. Jones's purpose in the
3 survey report was to have any of the Lincoln administrators
4 transferred, eliminated or terminated. Looking at Ms.
5 Butler's "teachers wanted something more than to know how to
6 file a grievance" statement, I do not find the purpose of
7 the survey report was collective bargaining agreement grievance
8 related.

9 24. The Lincoln teachers' purpose in the survey report.

10 The Lincoln teachers saw severe and damaging problems
11 at the school. The Lincoln teachers had to find a solution
12 (Lynch, tape 8). Because the Lincoln problems were not
13 being handled the way some of the Lincoln teachers felt, the
14 Lincoln teachers wanted a change in administration. The
15 survey report showed the Lincoln administration to be incompetent.
16 Ms. Bonk, a Lincoln teacher, agreed in part (Bonk, tape 5).
17 The Lincoln teachers did not want to hurt anyone
18 with the survey report. Ms. Lynch agreed that some of the
19 statements in the survey report unfortunately hurt. Ms.
20 Lynch also stated that sometimes we must tell the truth; and
21 that if the statements in the survey report were looked at
22 objectively, the statements should not hurt (Lynch, tape 7).

23 In response to a leading question, Dr. Poston agreed
24 that one of the threads that ran through the survey report
25 was an attempt to change Lincoln administration (Poston,
26 tape 7).

27 Looking at (a) the above statements, (b) the statements
28 of Ms. Butler above, (c) the Lincoln teachers' second thoughts
29 and concerns about the survey report, and (d) the statistical
30 summary of the survey report, I do not believe the Lincoln
31 teachers' main purpose in the survey report was to change
32 Lincoln administration. The main purpose of the survey
report was to change the student discipline procedure and
-31-

1 the teacher evaluation procedure. To change administration
2 at Lincoln school is only a thread in the survey report.

3 25. The affect of the survey report on the Lincoln
4 school administration, the Lincoln teachers and Lincoln
5 students.

6 The survey report was demoralizing to the Lincoln ad-
7 ministration (Poston, tape 7). Ms. McKennan was stunned by
8 the survey report. The survey report affected Ms. McKennan
9 physically, mentally and her reputation (McKennan, tape 6).

10 The survey report divided the Lincoln teachers into two
11 groups - for administration and against administration. Some
12 of the Lincoln teachers were forced to decide which group
13 they would be part of. Ms. Bonk isolated herself because
14 she was intimidated by the more vocal people. The Lincoln
15 teachers were very upset. The problem between the Lincoln
16 teachers is still going on (Bonk, tape 5; Van Valkenberg,
17 tape 4; McKennan, tape 6; Poston, tape 7).

18 The Lincoln survey report was demoralizing to the
19 Lincoln students (Poston, tape 7). The survey report had a
20 negative affect on the Lincoln students. The students would
21 say "we are the worst bunch of kids you ever had" and "aren't
22 we awful". To minimize the negative affect of the survey
23 report on the students, Ms. McKennan spent a lot of time
24 reassuring the Lincoln students and directed the Lincoln
25 teachers to do the same (McKennan, tape 6).

26 26. During the middle of February 1984, Dr. Poston and
27 Mr. Jones had an ongoing exchange about the school district's
28 policy of placing a letter of appreciation in the teacher's
29 personnel file who gave to the United Way. Mr. Jones, Dr.
30 Poston and others attended the February 13 school board
31 meeting. One of the school board members wanted to talk
32 about a letter from the Boulder school faculty to the Execu-

1 tive Director of the United Way. The Boulder faculty letter
2 was objecting to the letters of appreciation. After hearing
3 from both Dr. Poston and Mr. Jones about the matter, the
4 school board directed the school administrator to discon-
5 tinue the practice of putting a letter of appreciation into
6 the teachers' personnel file for those teachers who gave to
7 the United Way (Jones, tape 3).

8 Mr. Jones judged that Dr. Poston was visibly angry over
9 the United Way appreciation letters (Jones, tape 3).

10 27. On February 28, 1984, the superintendent's cabinet
11 had a meeting. The superintendent's cabinet is a group of
12 central office administrators and one building principal,
13 that meets with the superintendent to discuss current prob-
14 lems, projects and past, present, future actions of the
15 school board. One of the items of the February 28 meeting
16 was reported as follows:

17 The soliciting of Board Members as concerns of the
18 school district, without following through the
19 chain of command, prior to going to the Board,
20 will be considered as an act of insubordination.
Those staff members not observing this procedure
can expect to receive the appropriate reprimand.
This will affect all staff members.

21 (Exhibit B, attached to the School
22 District's Response).

23 The above report was produced by a building principal from a
24 lengthy discussion at the superintendent's cabinet meeting.
25 The report of the superintendent's cabinet meeting is the
26 method the superintendent's cabinet uses to communicate with
27 the other school administrators.

28 The NEA received a copy of the February 28 meeting
29 report from school board member Howard Simmons. Mr. Jones
30 did not know how wide the report of the superintendent's
31 cabinet meeting was normally distributed. After receiving a
32 copy of the superintendent's cabinet's February 28 meeting

1 report. the BEA did widely distribute the meeting report
2 (Jones, tapes 3, 4).

3 28. Dr. Poston contends that the above report does not
4 reflect what transpired at the superintendent's cabinet
5 meeting; that the administration was having problems with
6 teachers going to the school board with personal matters
7 without first following the chain of command; that a school
8 district operates more efficiently if the school district's
9 administration can deal with a problem first; that his com-
10 ments at the superintendent's cabinet meeting were in line
11 with school board policy 272P, supra; that he was not at-
12 tempting to stop the teachers from talking with the school
13 board about any matter; that if teachers wanted to talk to
14 the school board about a personal issue, the teachers should
15 talk first to the school administration; and if the teacher
16 wanted to talk to the the school board members about a
17 public issue the teacher can talk to the school board first
18 (Poston, tape 7). Both Dr. Poston and Mr. Jones agreed that
19 it is not proper for a teacher to contact a school board
20 member(s) outside the chain of command about a personal
21 matter (Jones, tape 4; Poston, tape 7).

22 29. Only one teacher was confronted by the school
23 administration for talking to a school board member about a
24 personal issue. Except for the one above teacher, the
25 record contains no evidence of the employer reprimanding,
26 threatening to reprimand or intimidating a teacher for
27 talking to a school board member(s) about the survey report,
28 the United Way letter or other BEA business (Jones, tapes 3,
29 4; Poston, tape 7). The record contains no evidence of the
30 employer using School Board Policy 272P to interfere with
31 any protected BEA business.
32

39. Distribution of the survey report.

The survey report circulated through the school district, parts of the Billings community and the state (Butler, tape 2; Denk, tape 5; Lowney, tape 5; Mossman, tape 3; McKennan, tape 6).

The BEA intended only to give copies of the survey report to the Lincoln teachers, the Lincoln administration, the school district administration and school board members (Jones, tape 3). The BEA office informed Ms. Butler the number of copies of the survey report was needed for distribution (Butler, tape 2). The survey report was distributed in the Lincoln school by BEA members (Jones, tape 3). Some of the Lincoln support staff asked for copies of the survey report. BEA members did give copies of the survey report to the Lincoln support staff (Lynch, tape 8). The Lincoln teachers did not intend teachers in other schools to get copies of the survey report. Ms. Lynch did not know how teachers outside of the Lincoln school got copies of the Lincoln survey report (Lynch, tape 8).

Ms. Butler did not know of any BEA members distributing the survey report and could not say no BEA members distributed the Lincoln survey report (Butler, tape 2). The BEA took no steps to limit the distribution of the survey report (Jones, tape 3; Van Valkenberg, tape 4; Butler, tape 2).

Shortly after February 9, two copies of the survey report were available in Meadowlark school. The first copy of the survey report was brought to Meadowlark school by a speech therapist, an itinerant teacher. The speech therapist travelled to all schools in the employer's school system. This speech therapist coordinates the speech therapy. Ms. Lowney, Principal, Meadowlark school, did not know if this coordinator of speech therapy is a member of the col-

1 lective bargaining unit (Lowney, tape 5). By combining
2 these facts and the findings in fact number 2, collective
3 bargaining unit, I find this coordinator of speech therapy
4 to be outside the collective bargaining unit.

5 Ms. Lowney did not know how the second copy of the
6 survey report got on the coffee table in the teachers'
7 lounge. At the Meadowlark school, all staff, support staff,
8 and parent volunteers have access to the teachers' lounge
9 (Lowney, tape 5).

10 Shortly after February 9, a copy of the Lincoln survey
11 report was available in the Ponderosa school either on the
12 principal's desk or the teachers' lounge. Like Meadowlark
13 school, the Ponderosa school's teachers' lounge is open to
14 all staff and volunteers. Ms. Mossman, Principal, Ponderosa
15 school, did not know how a copy of the survey report got
16 into Ponderosa school (Mossman, tape 5).

17 While Ms. Mossman was at an April 13 conference in
18 Bozeman, she was questioned by a professor about the survey
19 report. The professor did not state how he found out about
20 the Lincoln survey report. April 13 is after the Billings
21 Gazette reported about the Lincoln survey report on March 15
22 and 16 (Mossman, tape 5; School District Exhibit 7).

23 Ms. McKennan called the Glasgow Montana school system
24 about another school matter. A member of the Glasgow school
25 community stated he had a copy of the survey report. When
26 Ms. McKennan asked the gentleman from Glasgow how he got a
27 copy of the survey report, the gentleman just laughed
28 (McKennan, tape 6).

29 Ms. McKennan has had no knowledge of how the survey
30 report was distributed (McKennan, tape 6).

31 Kim Larsen, news reporter for the Billings Gazette,
32 asked Mr. Jones to see or get a copy of the survey report.

1 Mr. Jones refused. During one of the meetings between the
2 Lincoln teachers and Mr. Jones, the Lincoln teachers said no
3 to the newspaper's request for a copy of the survey report
4 (Jones, tapes 3, 4; Bank, tape 5).

5 31. Effect of the distribution of the survey report.

6 Mr. Butler agreed, in her opinion, it was appropriate
7 for the survey report to be widely distributed through the
8 school district. When asked do you think it was appropriate
9 to have a survey report with statements like (quote omitted)
10 circulating throughout the community, Ms. Butler generally
11 answered that she felt it was not appropriate to have the
12 kind of problems we had at Lincoln; and that because of the
13 nature of the information she had in the survey report and
14 the things she was told, she would answer yes (Butler, tape
15 2).

16 Mr. Jones believes the survey report in the wrong
17 hands. People outside the problem, could do harm to the
18 school administration. Mr. Jones felt that it was not
19 proper for the survey report to be general knowledge in the
20 community because the BEA was attempting to resolve the
21 problem internally at the lowest level and because the BEA
22 only intended to give copies of the survey report to the
23 people involved (Jones, tape 3).

24 A group of seven Ponderosa teachers, BEA members,
25 drafted a letter of protest to the BEA board of directors
26 about the Lincoln survey report. The seven Ponderosa tea-
27 chers thought the Lincoln survey report should have been
28 handled differently and the survey report had a negative
29 effect on the school district. The Ponderosa teachers and
30 the Ponderosa principal had a meeting with Mr. Jones about
31 the Lincoln survey report, the unfair labor practice charges
32 and related matters. Mr. Jones told the Ponderosa teachers

1 that the BEA erred in the distribution of the survey report.
2 The letter of protest was never delivered (Mossman, tape 5).

3 Members of the Billings community and teachers from
4 other schools were talking about the survey report. Members
5 of the Billings community and teachers from other schools
6 would ask Lincoln teachers and school administrators if the
7 problems at Lincoln Junior High School were as bad as they
8 were reported. Some Lincoln parents were pleased with the
9 operation of the Lincoln school during the 1983-84 school
10 year. Some Lincoln parents would question the Lincoln ad-
11 ministration about the Lincoln problem (Van Valkenberg, tape
12 4; Bank, tape 5; Lowney, tape 5; Mossman, tape 5; McKennan,
13 tape 6; Poston, tape 7).

14 The net effect of the Lincoln survey and survey report
15 was that it was absolutely disruptive and circumvented any
16 opportunity the school district had to take appropriate
17 action at the Lincoln school. Dr. Poston was not sure what
18 the purpose of the survey report was but the Lincoln survey
19 report did not accomplish the desired affect as stated by
20 Ms. Butler and Mr. Jones. The Lincoln survey report back-
21 fired. The survey report had no effect on the school board
22 in carrying out the policies of the school board. The
23 Lincoln survey report provided a red flag of hostility to
24 other school administrators who face difficult issues. The
25 Lincoln survey report undermined the administrative steel of
26 other administrators (Poston, tapes 6, 7).

27 The school administrators are tenured teachers and have
28 all the rights of tenured teachers. The Lincoln school ad-
29 ministrators' rights were ran over by the Lincoln survey and
30 Lincoln survey report. The school district has the right to
31 do all the evaluation of the teachers and administrators by
32 school board policy. The collective bargaining agreement

1 only addresses the question of evaluation of school district
2 teachers (Poston, tapes 6, 7; school district policy 6377;
3 Article XV of the collective bargaining agreement).

4 Dr. Poston states the Lincoln survey report was not
5 what he expected; that he did not get what he wanted; that
6 he did not support what he got; that what he got was a
7 general demoralizing advice that he could not do anything
8 about; that he did and would have supported a survey report
9 that was therapeutically critical with specific problems he
10 could respond to; that he did not support the Lincoln survey
11 report being distributed in other schools and to non-tea-
12 chers; that the teachers talked to students in the class-
13 rooms about the Lincoln problems and the Lincoln survey
14 report; and that in his mind the Lincoln problems, the
15 survey and the Lincoln survey report was handled badly
16 (Poston, tapes 6, 7).

17 Ms. McKenna believes that if the Lincoln teachers on a
18 one-to-one basis or in a small group had discussed the
19 Lincoln problems with her, the effect would have been more
20 constructive than the survey report. Ms. McKenna believes
21 that if the survey report was kept within the Lincoln school
22 the survey report would not have been so destructive and
23 that a lot of the Lincoln problems could have been corrected
24 (McKenna, tape 6).

25 32. Between February 9 and March 7, 1984, Dr. Poston
26 called Mr. Jones and asked that the BEA stop distributing
27 the survey report. Dr. Poston told Mr. Jones that the
28 school board members had got a copy of the survey report;
29 and that some of the school board members were upset. Mr.
30 Jones replied to Dr. Poston that the BEA had intended only
31 to parties involved, and that the above distribution was
32 accomplished in two or three days after the February 9

1 breakfast meeting. Therefore Dr. Poston's request to stop
2 distribution was moot (Jones, tape 3).

3 13. On March 7, 1984 Mr. Jones received the following
4 letter from Dr. Poston.

5 As you know, you shared with me a copy of the
6 "Survey Report" on Lincoln Junior High School
7 which was compiled by the Billings Education
8 Association, purporting to report the comments of
9 the teachers of Lincoln Junior High School con-
cerning the administration of that school. I am
told that the Survey Report was widely distributed
throughout the school district and its personnel.

10 On behalf of the Board of Trustees, the Billings
11 Education Association's actions in soliciting,
compiling, and indiscriminately distributing the
Survey Report are strongly protested.

12 For your information, a copy of the Survey Report
13 has been reviewed by the district's attorney, and
14 he informs us that the statements contained there-
in are libelous, and that your circulation of the
15 document presents grounds for an action against
the Billings Education Association for libel.
16 Additionally, the indiscriminate distribution of
the Survey Report appears to constitute a viola-
17 tion of Montana's statutes and school district
policies reserving to the district the right to
18 evaluate its employees, and to make all management
decisions concerning their retention. A similar
19 reservation of management rights is contained in
the collective bargaining contract, which your
20 organization negotiated and approved. Therefore,
it is the school district's position that the
21 Billings Education Association has violated the
terms of the collective bargaining contract by its
22 indiscriminate circulation of this anonymous
survey.

23 Our attorney further informs us that the viola-
24 tions of statute and policy, and the indiscrimi-
nate circulation of libelous statements, provide
25 grounds for disciplinary action against those
school district employees who were involved in
26 soliciting, compiling, and distributing the survey
results.

27 Premulgation of the Survey Report is also highly
unprofessional conduct on the part of the Billings
28 Education Association. The solicitation of anony-
mous complaints, and the widespread distribution
29 of the anonymous comments, reveals a dangerously
irresponsible attitude on the part of the Billings
30 Education Association. This type of irresponsible
behavior certainly appears to be of assistance in
31 achieving what must be the Association's goal of
fostering non-cooperation and insubordination with
32 the current administration and Board. Indeed,
such methods are not helpful to resolution of any

1 breakfast meeting. Therefore Dr. Poston's request to stop
2 distribution was moot (Jones, tape 3).

3 33. On March 7, 1984 Mr. Jones received the following
4 letter from Dr. Poston.

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6 "Survey Report" on Lincoln Junior High School
7 which was compiled by the Billings Education
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20 organization negotiated and approved. Therefore,
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24 tions of statute and policy, and the indiscrimi-
nate circulation of libelous statements, provide
25 grounds for disciplinary action against those
school district employees who were involved in
26 soliciting, compiling, and distributing the survey
results.

27 Promulgation of the Survey Report is also highly
unprofessional conduct on the part of the Billings
28 Education Association. The solicitation of anony-
mous complaints, and the widespread distribution
29 of the anonymous comments, reveals a dangerously
irresponsible attitude on the part of the Billings
30 Education Association. This type of irresponsible
behavior certainly appears to be of assistance in
31 achieving what must be the Association's goal of
fostering non-cooperation and insubordination with
32 the current administration and Board. Indeed,
such methods are not helpful to resolution of any

serious problem, particularly since they show a disdain for and an attempt to bypass the prescribed policies and procedures for action.

As there are grounds for both litigation against the Billings Education Association and disciplinary action against yourself and other teachers involved in gathering and distributing the survey results, these are options to which the Board of Trustees must give serious consideration. I therefore ask that you cease and desist any further distribution of or comment on the survey results, and that you meet with me at my office on Friday, March 9, 1984, at 2:15 p.m., to further discuss this issue and its ramifications." (Exhibit A, attached to the Unfair Labor Practice charge).

Mr. Jones left a photocopy of the letter at Ms. Butler's office because she was out of town for a few days at a training workshop. Mr. Jones had a meeting with the BEA Board of Directors. (Jones, Tape 3).

34. Ron Russell, a teacher at the Career Center, and alternate member of the BEA executive board, attended the Board of Director's meeting on March 7, 1984. Dr. Poston's March 7 letter was discussed. The BEA Board of Directors preferred that Mr. Jones did not meet with Dr. Poston alone. The next night, March 8, Mr. Russell learned that Mark Jones had no one to go with him to the meeting with Dr. Poston as the Board of Directors preferred. Mr. Russell volunteered to accompany Mr. Jones to the meeting with Dr. Poston. Mr. Jones instructed Mr. Russell to follow the proper procedures in securing leave time to attend the meeting.

About 7:40 a.m. on March 9, Mr. Russell asked his principal, Mr. Crumbaker, for leave time to attend the Jones-Poston meeting at 2:15 that day. Mr. Russell also informed Mr. Crumbaker about Mr. Jones' instructions.

Mr. Crumbaker called the school district administration. Mr. Crumbaker probably talked to Mr. Rogers first, then to Dr. Poston. Dr. Poston replied no if Mr. Russell had to leave his classroom, Mr. Russell had classroom res-

possibilities with the third time block at 2:00 p.m., with student clean up at 2:20 p.m. and with the student dismissal at 2:40 p.m. Mr. Crumbaker did not get a chance to explain to Dr. Poston that Mr. Russell's class would be covered by another teacher. Mr. Russell was present when Mr. Crumbaker called.

At 8:00 a.m., Mr. Russell left a message for Mr. Jones to call. Mr. Russell talked to Mr. Jones at noon.

Mr. Russell observed that the other six members of the BEA board of directors could not secure leave time to attend the Jones-Poston meeting because the other board members have a longer class schedule (Russell, tape 4; Jones, tape 3; Poston, tape 7).

35. After being informed about Mr. Russell's denial of leave time to attend the Jones-Poston meeting, Mr. Jones tried to get a lawyer to attend the meeting. The lawyer could not because of short time notice and scheduling.

During this time, Mr. Jones did talk to the BEA's legal counsel from Great Falls about the meeting. The BEA legal counsel instructed Mr. Jones not to give any incriminating information at the meeting. Mr. Jones did not have time to contact anyone else about attending the meeting.

At no time before the meeting did Mr. Jones ask Dr. Poston for a union representative at the meeting (Jones, tape 3; Poston, tape 7).

36. Dr. Poston, Ms. McKenna and Mark Jones were present at the March 9 meeting. Dr. Poston restated the contents of the March 7 letter. Dr. Poston asked Mr. Jones who started the survey, who organized the survey, who in Lincoln School started the activities, and what Mr. Jones thought would be appropriate disciplinary action for these activities.

1 To these questions, Mr. Jones did not answer and in-
2 formed Dr. Poston that he was advised by legal counsel not
3 to reveal anything that may be incriminating to himself or
4 others.

5 The parties did talk about the distribution of the
6 survey. Mr. Jones did tell who they distributed the survey
7 report to. Ms. McKennan asked Mr. Jones if he was trying to
8 ruin her. Mr. Jones replied no and stated the survey report
9 was not personal.

10 Again, McKennan-Poston requested the names of the
11 individuals involved. The meeting ended with the parties
12 agreeing to call the following week and schedule a second
13 meeting with both legal counsels present. The follow-up
14 meeting with legal counsels present never took place.

15 Mr. Jones never directly asked Dr. Poston for union
16 representation at the meeting. At no time before the meet-
17 ing or during the meeting did Mr. Jones ask for union repre-
18 sentation. At no time during the meeting did Mr. Jones ask
19 Dr. Poston to stop the meeting. Mr. Jones did not object to
20 meet with Dr. Poston alone because Mr. Jones thought Dr.
21 Poston had made up his mind and Mr. Jones had no one to
22 represent him if Dr. Poston agreed. Mr. Jones simply did
23 not answer the questions. Dr. Poston did not insist Mark
24 Jones answer the questions (Jones, tape 3; Poston, tape 7).

25 37. Mr. Jones judges from Dr. Poston's questions that
26 if he took the blame for the survey report that discipline
27 was his and if he named who was involved in the survey re-
28 port, the discipline would be theirs (Jones, tape 3).

29 38. By way of the March 7 letter and the March 9
30 meeting, Dr. Poston was registering a protest about the way
31 the Lincoln survey report was done. Dr. Poston stated the
32 objective of the school district was to stop the Lincoln

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26 if he took the blame for the survey report that discipline
27 was his and if he named who was involved in the survey re-
28 port, the discipline would be theirs (Jones, tape 3).

29 18. By way of the March 7 letter and the March 9
30 meeting, Dr. Poston was registering a protest about the way
31 the Lincoln survey report was done. Dr. Poston stated the
32 objective of the school district was to stop the Lincoln

1 survey report from happening again. The damage of the
2 Lincoln survey report had already been done. The letter and
3 the meeting was a chance for Dr. Poston and Mr. Jones to
4 work out a course of action for the future. Dr. Poston
5 stated that he did not intend to discipline Mr. Jones; and
6 that he did not intend to stop Mr. Jones from having a
7 representative at the March 9 meeting (Poston, tape 7).

8 39. Mr. Jones was never disciplined for the Lincoln
9 survey or the Lincoln survey report. No one was ever dis-
10 ciplined for the Lincoln survey or the Lincoln survey report
11 (Jones, tape 4; Poston, tape 7). Looking at (a) Dr. Poston's
12 letter of March 7, (b) Dr. Poston's actions of not-insisting
13 Mr. Jones answer his questions of March 9, (c) Dr. Poston's
14 statement of support for an inhouse, specific, therapeutic
15 report, (d) Dr. Poston's statement that the school district
16 intended to stop the Lincoln survey report from happening
17 again, and (e) the fact that no one was disciplined for the
18 survey report, I find the March 7 letter and the March 9
19 meeting was to stop a future survey report of the type and
20 distribution of Lincoln from happening again.

21 Looking at the same above facts, I find Dr. Poston's
22 March 7 letter and March 9 meeting tends to be coercive
23 because of the number of times libel and litigation are
24 stated.

25 40. On March 15, 16 and May 22, 1984, the Billings
26 Gazette reported at length about the Lincoln survey report
27 and related activities (District Exhibit 7). Ms. Bonk
28 believes that the newspaper report of the Lincoln survey
29 report made the Lincoln problems sound much worse than they
30 were (Bonk, tape 5).

31 41. After the filing of the Unfair Labor Practice
32 charges Dr. Poston called Mr. Jones. In reference to Count

1 First is concern over the possible disruptive
2 effect of such surveys on the evaluation process.
3 By statute, district policy, and the master agree-
4 ment, evaluation of administrators is reserved to
5 the district board. By its own contract, the BEA
6 has waived collective influence over the evalua-
7 tion process. Unsolicited and biased surveys such
8 as the Lincoln survey are not helpful to the
9 evaluation process, and they solicit conclusions
10 not facts which could be properly investigated.
11 The anonymous source produces complaints which are
12 unverifiable. They are subjective rather than
13 objective, and therefore the complaints are of
14 doubtful validity and trustworthiness. A major
15 factor in this concern is that the use of such
16 surveys could appear to be an attempt to both
17 bypass the normal chain of responsibility and to
18 present a variety of negative criticism while
19 protected behind the cloak of anonymity. This
20 type of approach could possibly be seen as vindic-
21 tive with little trustworthy merit and is not
22 helpful to eventual resolution of any serious
23 problems involved. In fact, it may mitigate
24 against evaluation and accountability of adminis-
25 trators.

26 Second is the concern for potential violations of
27 the rights of the subject administrator. The
28 solicitation of anonymous negative comments to be
29 presented as fact deprives the administrator of
30 the basic elements of due process: an objective
31 hearing, an opportunity to challenge data, and an
32 opportunity to confront those making the charges.
33 A biased survey, such as the type used at Lincoln
34 School which requested only negative comments, is
35 probably neither fair to the subject nor represen-
36 tative of total performance of the school adminis-
37 trator in question. Even if not so intended, the
38 anonymous negative survey is a perfect vehicle for
39 making and circulation of unfounded and libelous
40 comments and criticisms, which either would not be
41 made if the maker faced public disclosure, or
42 could be proven false if the facts underlying the
43 charge could be identified and investigated. A
44 major concern is the potential effect on the
45 administrator of the irresponsible disclosure of
46 unfair and non-rebuttable anonymous negative
47 criticisms.

48 Third is concern over the effect of such surveys
49 on school functioning. A biased survey outside
50 normal channels could be viewed as contentious and
51 antagonistic, rather than a sincere attempt to
52 work out any difficulties in a reasonable manner.
53 The solicitation process itself, which focuses on
54 and solicits negative comments, only serves to
55 exacerbate any existing problems and strengthen
56 any existing negativity or hostility. The BEA's
57 apparent willingness to use these surveys also
58 casts serious doubts on any possibility of help
59 for a situation. It further could create an
60 adversary relationship between administrators and
61 teachers which is obviously counter-productive to

1
2 the development of the spirit of cooperation
3 necessary to work together to provide quality
4 education and teacher job satisfaction.

5 Last, and certainly most importantly, I am con-
6 cerned about the motivation for the survey. I am
7 greatly interested in the concerns and job satis-
8 faction of teachers, and I care about their needs.
9 As you explained it, there are teachers who feel
10 they have complaints about their relationships
11 with the principal, but do not wish to file formal
12 grievances. Of course, that is their prerogative,
13 but I would hope such matters could be resolved
14 informally at the school level. It seems best for
15 the teachers to personally visit with the princi-
16 pal about their concerns to seek resolution. If
17 that is unsatisfactory, the individual teacher may
18 contact the elementary or secondary director to
19 discuss the matter on an informal basis. This
20 approach, involving face-to-face discussion, has
21 high likelihood of resolving any difficulties in
22 the supervisor-subordinate relationship.

23 As to the surveys, our legal counsel advises that
24 the solicitation and distribution of such surveys
25 is not a protected activity under federal and
26 state law. As such, it has no special protected
27 status, and its potential for violations of the
28 administrators' rights, and of statute, policy,
29 and the master agreement, pose serious problems
30 which need to be addressed. While I am open to
31 objective and proper comments, the biased solici-
32 tation of anonymous negative criticisms does not
33 seem to provide any useful information, and creates
34 an atmosphere which is actually counter-productive
35 of any efforts towards resolution of perceived
36 problems.

37 Because of these serious concerns, I hope the BEA
38 will reconsider its plan to conduct such a survey
39 and will work toward cooperation with the district
40 toward mutual goals of harmonious working relation-
41 ships. Genuine interest in solving any problems
42 would seem to call for nothing less.

(BEA Exhibit 3)

43 Dr. Poston found the Meadowlark School survey report
44 was handled in a good manner. According to Dr. Poston, the
45 Meadowlark survey did not violate any one's rights, was not
46 distributed to the other schools, was not widely distributed
47 in the community, provided the school administrators with
48 some good information, contained some non-specific parts but
49 not libelous in nature, and provided a good form of teacher
50 input. The Meadowlark survey report was what Dr. Poston

1 expected when the Lincoln survey report was done (Poston,
2 tape 7). The Meadowlark survey report did not become public
3 information because the BEA learned from the Lincoln survey
4 report on how to keep the survey report under control (Jones,
5 tape 4).

DISCUSSION

Count 1 of Unfair Labor Practice Charge 5-84

6
7
8
9
10 Comparing the statements contained in Count 1 of the
11 Unfair Labor Practice Charge with the above findings, the
12 BEA, BEA officer(s), BEA agent(s) or BEA member(s):

- 13 1. Did receive a number of complaints from the
14 Lincoln teachers about student discipline,
15 teacher evaluation and other item(s) (FF 5).
16 2. Before January 1984, did try to correct some
17 of the complaints (FF 8).
18 3. During the fall of 1983 did inform and continue to inform Dr. Poston about the Lincoln
19 complaints and the future actions of the BEA
20 (FF 8, 11).
21 4. On January 26 did do a survey of some 35-38
22 Lincoln teachers (FF 13).
23 5. Did verbatim compile the Lincoln survey into
24 a report (FF 15) and
25 6. Did distribute the Lincoln survey report to
26 Lincoln teachers, Lincoln support staff,
27 Lincoln administration, school district
28 administration and school board members (FF
29 30).

30 The Lincoln survey report did become widely distributed (FF
31 30). The additional circulation, above the BEA distribution,
32 cannot be attributed to the BEA or denied by the
33 BEA (FF 30). The Lincoln survey report was distributed by
34 at least one non-bargaining unit member, coordinator of
35 speech therapy (FF 30). Dr. Poston by his March 7 letter
36 and his March 9 meeting did try to stop the Lincoln survey
37 report from happening in the future (FF 30).

38 The issue is DID DR. POSTON BY TRYING TO STOP THE
39 LINCOLN SURVEY REPORT FROM HAPPENING IN THE FUTURE INTERFERE
40 WITH PROTECTED CONCENTED ACTIVITIES OF THE BEA?

1 A. THE LEGAL STANDARD TO BE APPLIED TO COUNT I.

2 Because the Board of Personnel Appeals has never ad-
3 dressed this issue before, we will look to the National
4 Labor Relations Board for guidance.

5 We begin our review of the law in this area with a
6 quote from Professor Morris in the Developing Labor Law, 2nd
7 Edition, 1983.

8
9 In cases presenting the issue of whether particu-
10 lar employee conduct is sufficiently "disloyal" to
11 remove it from the protection of Section 7, the
12 Board has progressively narrowed the area of un-
13 protected activity.

14 Developing Labor Law, P. 161

15 The U.S. Supreme Court in NLRB vs. Electrical Workers
16 (Jefferson Standard Broadcasting Company) 346 U.S. 465, 33
17 LRM 2183, (1953) addressed these facts:

- 18 1. Stalemate negotiations between the union and
19 the employer.
20 2. Peaceful picketing by union technicians while
21 continuing employment without striking.
22 3. "...Without warning, several of its techni-
23 cians launched a vitriolic attack on the
24 quality of the company's television broad-
25 casts. Five thousand handbills were printed
26 over the designation 'WBT TECHNICIANS'. These
27 were distributed on the picket line, on the
28 public square two or three blocks from the
29 company's premises, in barber shops, restaur-
30 ants and buses. Some handbills made no
31 reference to the union, to a labor contro-
32 versy or to collective bargaining. They read:

33 'IS CHARLOTTE A SECOND-CLASS
34 CITY?

35 'You might think so from the kind of Tele-
36 vision programs being presented by the Jef-
37 ferson Standard Broadcasting Co. over WBTV.
38 Have you seen one of their television prog-
39 rams lately? Did you know that all the
40 programs presented over WBTV are on film and
41 may be from one day to five years old. There
42 are no local programs presented by WBTV. You
43 cannot receive the local baseball games,
44 football games or other local events because
45 WBTV does not have the proper equipment to
46 make these pickups. Cities like New York,
47 Boston, Philadelphia, Washington receive such
48 programs nightly. Why doesn't the Jefferson

1 Standard Broadcasting Company purchase the
2 needed equipment to bring you the same type
3 of programs enjoyed by other leading American
4 cities? Could it be that they consider
5 Charlotte a second-class community and only
6 entitled to the pictures now being presented
7 to them?

8
9 "WST TECHNICIANS"

10 (33 LRM at 2184).

- 11 4. The discharging of the technicians involved
12 sponsoring and distributing the above hand-
13 bill.

14 The U.S. Supreme Court set forth the following lesson:

15 Section 10(c) of the Taft-Hartley Act expressly
16 provides that "No order of the Board shall require
17 the reinstatement of any individual as an employee
18 who has been suspended or discharged, or the pay-
19 ment to him of any back pay, if such individual
20 was suspended or discharged for cause." There is
21 no more elemental cause for discharge of an em-
22 ployee than disloyalty to his employer. It is
23 equally elemental that the Taft-Hartley Act seeks
24 to strengthen, rather than to weaken, that coope-
25 ration, continuity of service and cordial contrac-
26 tual relation between employer and employee that
27 is born of loyalty to their common enterprise.

28
29 Many cases reaching their final disposition in
30 the Courts of Appeals furnish examples emphasizing
31 the importance of enforcing industrial plant
32 discipline and of maintaining loyalty as well as
33 the rights of concerted activities. The courts
34 have refused to reinstate employees discharged for
35 "cause" consisting of insubordination, disobe-
36 dience or disloyalty. In such cases, it often has
37 been necessary to identify individual employees,
38 somewhat comparable to the nine discharged in this
39 case, and to recognize that their discharges were
40 for causes which were separable from the concerted
41 activities of others whose acts might come within
42 the protection of Section 7. It has been equally
43 important to identify employees comparable to the
44 tenth man in the instant case, who participated in
45 simultaneous concerted activities for the purpose
46 of collective bargaining or other mutual aid or
47 protection but who refrained from joining the
48 others in separable acts of insubordination,
49 disobedience or disloyalty. In the latter in-
50 stances, this sometimes led to a further inquiry
51 to determine whether their concerted activities
52 were carried on in such a manner as to come within
53 the protection of Section 7.

54
55 In the instant case the Board found that the
56 company's discharge of the nine offenders resulted

1 from their sponsoring and distributing the "Second-
2 class City" handbills of August 24-September 3,
3 issued in their name as the "WBT TECHNICIANS" from
4 August 24 through September 3, unquestionably
5 would have provided adequate cause for their
6 disciplinary discharge within the meaning of
7 Section 10(c). Their attack related itself to no
8 labor practice of the company. It made no refer-
9 ence to wages, hours or working conditions. The
10 policies attacked were those of finance and public
11 relations for which management, not technicians,
12 must be responsible. The attack asked for no
13 public sympathy or support. It was a continuing
14 attack, initiated while off duty, upon the very
15 interests which the attackers were being paid to
16 conserve and develop. Nothing could be further
17 from the purpose of the Act than to require an
18 employer to finance such activities. Nothing
19 would contribute less to the Act's declared pur-
20 pose of promoting industrial peace and stability.

21 The fortuity of the coexistence of a labor
22 dispute affords these technicians no substantial
23 defense. While they were also union men and
24 leaders in the labor controversy, they took pains
25 to separate those categories. In contrast to
26 their claims on the picket line as to the labor
27 controversy, their handbill of August 24 omitted
28 all reference to it. The handbill diverted atten-
29 tion from the labor controversy. It attacked
30 public policies of the company which had no dis-
31 cernible relation to that controversy. The only
32 connection between the handbill and the labor
33 controversy was an ultimate and undisclosed pur-
34 pose or motive on the part of some of the sponsors
35 that, by the hoped-for financial pressure, the
36 attack might extract from the company some future
37 concessions. A disclosure of that motive might
38 have lost more public support for the employees
39 than it would have gained, for it would have given
40 the handbill more the character of coercion than
41 of collective bargaining. Referring to the attack,
42 the Board said "In our judgment, these tactics,
43 in the circumstances of this case, were hardly
44 less 'indefensible' than acts of physical sabo-
45 tage."

46 (33 LRRM at 2186-88)

47 The 4th Circuit Court of Appeals in Roanoke Hospital
48 vs. NLRB, 338 F.2d. 607, 92 LRRM 3158, 1967, found the emp-
49 loyer violated Section 8(a)(1) of the NLRA by issuing a
50 warning notice to nurse Weinman, removing nurse Fields name
51 from the Hospital call-in list and not re-employing nurse
52 Fields. In Roanoke Hospital, supra, nurse Fields sent the
53 following letter to the newspaper:

Nursing dilemma

I RESSENT your labeling the local nursing salary situation a pay gripe. It is a hard fact in every local nurse's life.

In 1953 I graduated from nursing school. I was dedicated, enthusiastic, concerned, and wanted to work with people. Eleven years of hospital nursing have taken their toll on me.

I find dedication will not feed my family; enthusiasm will not pay the house note. Concern will not build a bank account for old age nor help with my children's college education. Love will not provide me with a car, or gas to run it. Former patients will not provide my family's clothing.

I recently left hospital nursing for employment in a physician's office. The salary is good, the benefits are excellent. The duties are a challenge not a frustration. After a day's work I know I will not be asked to work eight hours more because of a help shortage, and I feel guilty when I say no. For the first time in nine years I have time to spend with my family.

Many more nurses in this area are leaving hospital nursing for the same reasons.

The public cannot afford to continue to sit idle or remain mute concerning such a sad situation as nursing finds itself in in our area. Won't you speak up before more nurses leave hospital nursing?

(92 LRRM at 3159)

Nurses Fields and nurse Weidman were elected temporary officers of the Virginia Nursing Association during the upcoming organizational campaign. Later, both nurses were interviewed by a local television station. The nurses were reported to state the following during the television interview:

There are times, especially the 3:00 to 11:00, and the 11:00 to 7:00 shifts, where there are no RN's to cover the whole medical-surgical unit of 40 patients. And this isn't just particular at our hospital alone in the valley. . . that's a known fact. And, you know we feel very badly about this, we feel it is directly related also to the salary and benefits situation we're having, like Helen was saying earlier. The cost of living, according to the National Chamber of Commerce figures, that have come out, are just as high here in the Roanoke area as they are anywhere in the country. And yet our salaries in this area are like 60 to 80 cents an hour lower than they are anywhere else in the country.

(92 LRRM at 3160)

1 The 4th Circuit Court of Appeals sets forth the fol-
2 lowing lesson:
3

4 [Director of Nursing] Hanley met with Weinman.
5 Hanley stated that she "was appalled at what she
6 had said on the television interview." Weinman
7 responded that she had said nothing which was
8 untrue. Hanley replied: "That may be so; but the
9 impression that you created with the public was
10 disastrous to the hospital as far as I was con-
11 cerned."

12 Hanley told Fields that she would not be reemp-
13 loyed "because of her prospective dissatisfaction
14 with employment at Community Hospital based on
15 publicly announced dissatisfaction and frustration
16 with working conditions at Community Hospital."

17 As to Weinman, the Hospital argues that, regard-
18 less of its motivation, the warning notice could
19 not constitute an unfair labor practice since her
20 disparaging and disloyal statements were unpro-
21 tected under NLRB v. International Brotherhood of
22 Electrical Workers, 365 U.S. 464, 33 LRRM 2183
23 (1953). [Jefferson Standard] "Irene Weinman,
24 either intentionally or negligently, disparaged
25 and discredited the quality of nursing care avail-
26 able at the Hospital, to the point of insinuating
27 that it was unsafe." Brief for Appellant at 33.
28 We conclude that Weinman's statements were not
29 unprotected. As Hanley admitted, they were true,
30 and unlike the statements found unprotected in
31 Electrical Workers, supra, they were directly
32 related to protected concerted activities then in
33 progress.

34 (93 LRRM at 3160)

35 The Eighth Circuit Court of Appeals in NLRB v. Grey-
36 hound Lines, 560 F. 2d 354, 108 LRRM 2531, 1981, found the
37 employer violated Section 8(a)(1) of the NLRA by suspending
38 two bus drivers for issuing a press release announcing the
39 intentions of the bus drivers to strictly obey the 55 mile
40 an hour speed limit. The 8th Circuit Court of Appeals set
41 forth the following lesson:

42 On August 26, [Driver] Banner distributed the fol-
43 lowing press release to the media:

Head: GREYHOUND DRIVERS TO SET LABOR DAY PACE
Greyhound drivers nationwide will drive strictly within the 55 mile-per-hour speed limit through the Labor Day weekend to save fuel and set an example for other drivers.

Several members of the State Highway Patrols have commended the drivers for this effort.

It is well known that on rare occasions Greyhound drivers will slip over the 55 mph limit to accommodate their passengers after departure delays, bus breakdowns, inclement weather and other unexpected delays.

Veteran driver and Union Steward, Jerry Jenson said "over 350 drivers interviewed last week from coast to coast unanimously supported the plan which is expected to result in some connecting departure delays."

Jenson declined to comment when asked if the "slowdown" had anything to do with a recent attempt to work regular-run drivers seven days a week without overtime, the dismissal of 36 drivers three weeks ago in Salt Lake City who were protesting alleged contract violations, or with Greyhound's numerous runs that are impossible to operate within the 55-mph speed limit.

On September 6, Benner and Jenson received disciplinary notices with fourteen-day suspensions for "words or acts of hostility to the Company, or words or acts which result in damage to the Company's reputation, property or services and for divulging affairs of the Company without approval."

It is argued by respondent that not all concerted activity is protected by Section 7. Among the unprotected categories of activities are those "characterized as 'indefensible' because they . . . show a disloyalty to the workers' employer which . . . [is] unnecessary to carry on the workers' legitimate concerted activities." NLRB v. Washington Aluminum Co., 370 U.S. 9, 17, 80 LRRM 2235 (1962). See NLRB v. Local Union No. 1229 (IBEW), 344 U.S. 464, 477, 33 LRRM 2183 (1953). Respondent concedes that employee communications to the public may be protected, that is, "defensible," if they are directly related to an ongoing labor dispute, are not a disparagement of the Company's reputation or the quality of the Company's product, and are not maliciously motivated. See Local 1229, supra; Allied Aviation Service Co. of New Jersey, Inc., 248 NLRB No. 26, 103 LRRM 1454 (1980), encl'd, 636 F.2d 1210, 108 LRRM 2279 (3d Cir. 1980); Stephens Institute, 241 NLRB No. 133, 101 LRRM 1052 (1979). It is respondent's position that the press release issued by Benner and Jenson does not fall within this range of protected communications.

First, respondent argues that there was no ongoing labor dispute. There was no evidence that any grievance had been filed, although grievance procedures under the collective bargaining agree-

ment were in effect at that time. However, there were statements by the Board that Benner had complained unsuccessfully to the Company on several occasions regarding the schedule problems. 29 U.S.C. Section 152(9) defines labor dispute as including "any controversy concerning terms, tenure or conditions of employment." (Emphasis added.) Given this broad definition, we conclude that the Board's finding is supported by the evidence of discussions and actions preceding and in preparation for the proposed "slowdown" over the Labor Day weekend in protest of company policies and actions.

Second, Respondent contends that even if there existed an ongoing labor dispute, the press release was not a communication directly related to the dispute and was therefore unprotected. The reason stated in the press release itself for the "slowdown" was to save fuel and set an example. Respondent submits that the only reference in the press release of employee grievances was in the fifth paragraph and that Jensen's refusal to comment on the matters mentioned therein should not be considered a "communication" relation to the dispute. The Board, however, takes the position that by refusing to comment, Jensen was indirectly conveying the employees' message that the proposed "slowdown" was, in fact, a protest against the enumerated company actions and policies.

In Allied Aviation, the Board stated that "the touchstone [is] not whether the communication constituted a virtual carbon copy of the specific arguments raised with the respondent, but [is], rather, whether the communication was a part of and related to the ongoing labor dispute." 103 LRRM at 1456 (emphasis in original). Regardless of the reasons stated in the release itself, it is clear from the discussions and actions preceding the release that the "slowdown" was in protest of the enumerated grievances, and it is likely that the reference to the grievances in the last paragraph of the release would suggest such a relationship to the reader. We therefore find substantial evidence to support the Board's finding that the press release was related to the ongoing dispute.

Third, Respondent contends that the press release constituted a public disparagement of the Company's product and reputation and was therefore unprotected. See Local 1229, 346 U.S. at 474; Allied Aviation, 103 LRRM at 1456. Respondent asserts that the statement regarding expected connecting departure delays indicates to the public that Greyhound's service would be inadequate over the holiday weekend. The press release also implies that Greyhound condones or encourages exceeding the speed limit in order to avoid or to minimize delays, although, in fact, Greyhound provides in the Drivers' Rule Book that drivers must obey all posted speed limits and "[w]hen late, stay late." (Emphasis in Rule Book.) Respondent argues that the statements and accompanying instructions constitute a disparagement of Greyhound's services and reputation.

1 The Board, on the other hand, characterized the
2 reference to expected delays as a simple statement
3 that, as a result of the drivers' strict obser-
4 vance of the speed limit to protest the Company's
5 actions, some delays might occur. The Board found
6 that the release did not contain any insults or
7 negative insinuations about the Company's services
8 or integrity with respect to the customers.

9 In comparing the statements in the press release
10 to others that have been found protected and
11 unprotected, we cannot disagree with the Board's
12 finding that the statements fall short of an
13 unprotected disparagement. Compare Allied Aviation,
14 supra (letters to customers that employer's proce-
15 dures were unsafe, protected), and Community Hos-
16 pital of Roanoke Valley, Inc. v. NLRB, 583 F.2d
17 607, 92 LRM 3158 (4th Cir. 1978) (statement in
18 television interview that hospital was under-
19 staffed, protected), with Local 1229, supra (hand-
20 bills criticizing employer's local programming,
21 unprotected).

22 Finally, respondent argues that the release is
23 not protected because it was maliciously moti-
24 vated. See Allied Aviation, 103 LRM at 1456. As
25 evidence of malice, respondent relies on Benner's
26 statement that "things would really be screwed up
27 if we held to 55 for any period of time." Respon-
28 dent also points out that the press release con-
29 tained false statements regarding the alleged
30 dismissal of the Salt Lake drivers and the seven-
31 day work week proposal, which had been rescinded
32 before the release. This disregard for the truth,
33 respondent contends, is additional evidence of
34 Benner's and Jensen's malicious motive.

35 The Board again viewed the actions challenged by
36 respondent in a different light. Benner's state-
37 ment was interpreted as merely a prediction of the
38 potential effectiveness of the proposed "slowdown"
39 rather than as evidence of an intent to harm the
40 Company. The Board further found that Benner had
41 attempted to confirm the dismissal of the Salt
42 Lake drivers and was relying on the information he
43 had received from people in Salt Lake City. We
44 cannot say the Board's finding of no malicious
45 motive is not supported by the record.

46 We recognize that the "lines defining [Section 7
47 rights] have of necessity been painted with broad
48 strokes." Bugh H. Wilson Corp. v. NLRB, 414 F.2d
49 1345 1347, 71 LRM 2827 (3d Cir. 1969).

50 (Emphasis added, 103 LRM at 2532-3)

51 The 1st Circuit Court of Appeals in NLRB vs. Mount
52 Desert Island Hospital, 695 F.2d 634, 112 LRM 2110, 1982,
53 found the employer violated Section 8(a)(1) of the NLRA with
54 the following facts and teachings:

1 The Hospital hired Grange as a licensed practical
2 nurse in September 1977. In May 1978, Grange
3 began to voice complaints about working conditions
4 in the Hospital as well as what he considered to
5 be inept managerial policies. He discussed his
6 concerns with fellow workers, placed signed and
7 unsigned complaints in the Hospital's suggestion
8 box, and approached his supervisor, Director of
9 Nursing Louise Dunne, to discuss his view of the
10 Hospital's shortcomings.

11 After receiving little response from his super-
12 iors, Grange sent a letter to the editor of the
13 Sar Harbor Times on July 3, 1978. This letter
14 detailed his complaints, both with regard to
15 working conditions at the Hospital and with regard
16 to the level of patient care provided by the
17 Hospital. Subsequent to the publication of the
18 letter on July 8, the editor of the Times visited
19 the hospital and discussed working conditions with
20 thirty additional employees who substantiated many
21 of Grange's claims. Two weeks later, Grange
22 circulated a petition among the employees of the
23 Hospital requesting that the community and the
24 Board of Trustees of the Hospital investigate
25 working conditions at the Hospital. Over one
26 hundred employees signed the petition. The Times
27 printed the petition on July 27. The adverse
28 publicity allegedly was a factor in the decision
29 of the Board of Trustees to cancel its capital
30 fund drive. The Hospital did not discipline
31 Grange for his activities.

32 Grange resigned of his own accord in December
33 1978 to pursue a more advanced nursing degree as a
34 registered nurse (RN). At his exit interview he
35 reiterated that, while he enjoyed working with
36 fellow employees, he had found many of the Hospi-
37 tal's procedures to be grossly inadequate. He
38 received notification that he passed the RN exami-
39 nation in March 1979.

40 In a letter sent shortly thereafter to Dunne,
41 his former supervisor, Grange requested an appli-
42 cation for summer employment. Grange called the
43 Hospital on March 27 to renew his request. Dunne
44 responded that nursing positions were available,
45 particularly on one shift. Grange said he wanted
46 such a position. Dunne told him to consider that
47 he was hired. Grange submitted an official appli-
48 cation. Dunne's assistant informed him again to
49 consider himself employed as of the summer.

50 When Dunne returned from vacation, she informed
51 Lotreck, the Hospital Administrator, that she
52 planned to hire Grange. According to Hospital
53 procedures, it was necessary for Lotreck to ap-
54 prove all hiring decisions. Lotreck instructed
55 Dunne to tell Grange that no positions were avail-
56 able, stating that he could not hire someone who
57 had caused the Hospital so much trouble. Subse-
58 quently, on May 2, Lotreck instructed his assis-
59 tant to contact the administrator of the Sonagee
60 Estates Nursing Home to describe the Hospital's
61 dissatisfaction with Grange and to recommend that
62 Sonagee not hire him if he should apply. The
63 administrator of Sonagee testified that he re-

ceived a phone call informing him that Grange was a troublemaker who had caused grief at the Hospital.

The Hospital next asserts that, even if concerted, Grange's letter to the newspaper did not constitute "protected" activity. It relies on the Supreme Court's decision in NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), 344 U.S. 464, 13 LRM 2183 (1953), for the proposition that concerted activity which manifests disloyalty to an employer is unprotected under the Act. In Jefferson Standard, employees striking a broadcasting company passed out leaflets attacking the company's programming as amateurish and second-class. The Court held that distributing the leaflets was indefensible since the leaflets attacked company policies unrelated to labor relations, they did not ask for public support, and the employees were obligated to protect the employer's interests while remaining on the company payroll. Id. at 475-77. In implementing the disloyalty rule of Jefferson Standard, the Board and courts of appeals have focused on two criteria - whether the appeal to the public concerned primarily working conditions and whether it avoided needlessly tarnishing the company's image. For example, the Board in Coca-Cola Bottling Works, 185 NLRB 1050, 75 LRM 1551 (1970), found that striking employees who distributed leaflets warning customers of possible vermin and dirt in coke bottles were not engaged in protected activity. In American Arbitration Association Inc., 223 NLRB 71, 96 LRM 1431 (1977), the Board found that in protesting work conditions an employee forfeited her protected status by ridiculing her employer in a questionnaire mailed to clients. See also New York Chinatown Senior Citizens Coalition Center, Inc., and April S. Sung, 239 NLRB 614, 100 LRM 1028 (1978) (Board found that employees who publicly disparaged the way their employer managed the center were not protected under the Act). Similarly, the Hospital here argues that Grange's decision to air his complaints in public demonstrated disloyalty and hence the activity was unprotected. It suggests that Grange should have continued to protest internally through the proper channels and that his public display proves that he was not sincerely interested in improving labor relations.

The Board and courts of appeals, however, have found public appeals protected when they appeared necessary to effectuate the employees' lawful aims. In Misericordia Hospital Medical Center v. NLRB, 623 F.2d 808, 104 LRM 2666 (2nd Cir.1980), the court held that the employer violated Section 8(a) (1) in discharging a nurse for conveying criticism of the hospital administration's staffing policies to an outside accrediting agency. Although some of the complaints were directed at managerial policies outside the scope of working conditions,

1 the court found sufficient nexus with a labor dis-
2 pute to hold that the activity was protected. Id.
3 at 812-14. Similarly, in Community Hospital of
4 Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 92
5 LRRM 2158 (4th Cir. 1976), the court upheld the
6 Board's finding that the employee in question was
7 not "disloyal." There, in a case strikingly sim-
8 ilar to the instant one, Weinman, a nurse, in
9 interviews on television protested the hospital's
10 working conditions. The court held that the nurse's
11 statements were directly connected to the working
12 conditions at the hospital, were not fabricated,
13 and hence were not disloyal. Id. at 816. Indeed,
14 in the instant case, Grange had complained to his
15 superiors previously and had placed signed com-
16 plaints in the suggestion box. Apparently he felt
17 that recourse to the public was necessary. The
18 Hospital attempts to distinguish Roanoke Valley
19 by asserting that the nurse's charges were justi-
20 fied in Roanoke while Grange's arguably were not.
21 Such a distinction strikes us as not persuasive as
22 long as the assertions were not made in reckless
23 disregard of the truth. Grange's comments, like
24 those of Weinman, were made for the purpose of im-
25 proving working conditions and thus the level of
26 patient care. The ALJ found that criticism of the
27 Hospital's administration was intertwined inextri-
28 cally with complaints of working conditions. Even
29 if the staffing situation were worse in Roanoke,
30 Grange published his letter in a spirit of loyal
31 opposition - not out of malice or anger. We hold
32 that the Board's conclusion that Grange's public
33 protests were protected under the Act finds sub-
34 stantial support in the record.

35 (Emphasis added, 112 LRRM
36 at 2119, 2120, 2122, 2133.)

37 From all the above teachings, the test to determine if
38 employee's communications are protected activities is:

39 1. DID THE APPEAL TO THE PUBLIC CONCERN PRIMARILY
40 WORKING CONDITIONS?

41 2. DID THE APPEAL TO THE PUBLIC NEEDLESSLY TARNISH
42 THE COMPANY'S IMAGE?

43 (a). WERE THE ASSERTIONS MADE IN RECKLESS DISRE-
44 GARD OF THE TRUTH?

45 (b). WERE THE ASSERTIONS MADE IN THE SPIRIT OF
46 LOYAL OPPOSITION - NOT OUT OF MALICE OR ANGER?

47 B. THE FACTS OF THIS CASE APPLIED TO THE ABOVE STATED
48 LEGAL STANDARDS

1 1. Did the Lincoln Survey Report concern primarily
2 working conditions? The BEA was complaining and protesting
3 actions concerning their employment - handling of student
4 discipline and teacher evaluation (FF7). Student discipline
5 and teacher evaluation does have an effect on the teacher's
6 working conditions (FF7).

7 Like Greyhound, supra, the Lincoln Survey Report in-
8 volved a labor dispute. Greyhound teaches that employee
9 communications are "defensible if they are directly related
10 to an ongoing labor dispute." Like Section 29 U.S.C. 152(9),
11 Section 29-31-103(10) MCA finds a labor dispute as includ-
12 ing "any controversy concerning terms, tenure or conditions
13 of employment or concerning the association or representa-
14 tion of persons in negotiating, fixing, maintaining, chang-
15 ing or seeking to arrange terms or conditions of employment,
16 regardless of whether the disputants stand in the proximity
17 relation of the employer and employee".

18 The Lincoln Survey Report involved an ongoing labor dis-
19 pute. The Lincoln teachers tried to talk to Lincoln manage-
20 ment about the problems (FF8). Ms. Butler and Dr. Poston
21 had their first talk about the Lincoln school problems in
22 the fall of 1983 (FF8). Ms. Butler and Dr. Poston had
23 additional talks about the Lincoln school problems (FF 11,
24 12).

25 Unlike Jefferson Standard, supra, but like Roanoke
26 Hospital, supra, Greyhound, supra and Mount Desert Island
27 Hospital, supra, the Lincoln Survey Report concerned working
28 conditions.

29 2. DID THE LINCOLN SURVEY REPORT NEEDLESSLY TARNISH
30 THE SCHOOL DISTRICT'S IMAGE?

31 In Jefferson Standard, supra, the technicians stated
32 the Company provided poor television programs. In the

Lincoln Survey Report, the BEA did not state the school district provided a poor education (FF22). I do not find Jefferson Standard handbill equal to the Lincoln Survey Report.

In Roanoke Hospital, supra, the nurses complained about wages and staffing levels - no RNs on the 11-7 shift in the medical-surgical unit. In the Lincoln Survey Report, the BEA complained about student discipline and teacher evaluation. The employer in Roanoke Hospital, supra, stated "Nurse Irene Weinman either intentionally or negligently disparaged and discredited the quality of nursing care available at the hospital, to the point of insinuating that it was unsafe." The 9th Circuit Court of Appeals rejected the employer's argument and found Weinman's statements protected. When I compare the statement in Roanoke Hospital, supra, to the statements in the Lincoln Survey Report, I find them comparable and the Lincoln Survey Report was protected.

The employer in Greyhound, supra, argued the employee's press release constituted a public disparagement of the company product and reputation and was therefore unprotected. The Court rejected the employer's argument. When I compare the press release in Greyhound, supra, to the statements in the Lincoln Survey Report, I find them comparable and the Lincoln Survey Report protected.

The employer in Mount Desert Island Hospital, supra, argued that the employee's decision to air his complaints in public demonstrated disloyalty - unprotected activities. The Court rejected the employer's argument. The employee was complaining about staffing levels, work load, patient care and wages. When I compare the employee's letter to the editor in Mount Desert Island Hospital, supra, to the Lincoln Survey Report, I find them comparable and the Lincoln Survey Report protected.

1 The District of Columbia Court of Appeals in Retail
2 Store Union (Coca Cola Bottling Works) vs. NLRB, 466 F.2d
3 380, 80 LRR 3244, 1972, found the union's "Health Warning"
4 leaflets implying that because of the inexperienced replacements
5 at the plant, coca cola bottles might be unclean and a
6 hazard to the health, an unprotected statement. When I
7 compare the leaflets in Coca Cola, supra, to the statements
8 in the Lincoln Survey Report, I do not find the same type of
9 implications. In Coca Cola, supra, the leaflets stated
10 "empty coke bottles very often serve as collectors of strange
11 things. Roaches, ants, flies, bugs, and even dead mice are
12 found in return bottles." After the bold words Health
13 Warning! and Beware! I do not find the Coca Cola leaflets
14 comparable to the Lincoln Survey Report. I do not find the
15 BSA implied with the same force or greater force that the
16 school district had a poor educational product as the Coca
17 Cola leaflet did.

18 The NLRB in Springfield Library and Museum, 236 NLRB
19 No. 221, 89 LRM 1289, 1978, found the employer violated the
20 NLRB by reprimanding the union president because she wrote
21 an article for the union newsletter that referred to the
22 alleged incompetency of an employer official. I find the
23 union newsletter in Springfield, supra, comparable to the
24 Lincoln Survey Report.

25 I find the Lincoln Survey Report did not needlessly
26 tarnish the school district's image. The Lincoln Survey
27 Report did not tarnish the school district's image like the
28 hand bills did in Jefferson Standard, supra, and Coca Cola,
29 supra. The Lincoln Survey Report is comparable to the pro-
30 tected activities in Roanoke Hospital, supra, Greyhound,
31 supra, Mount Desert Island, supra, and Springfield, supra.

2(a) DID THE BEA'S ASSERTIONS IN THE LINCOLN SURVEY
REPORT RECKLESSLY DISREGARD THE TRUTH?

In a handbilling case, the 3rd Circuit Court of Appeals
in Texaco Inc. vs. NLRB, ___ F. 2d ___ 88 LRRM 2283, 1972,
set forth the following test:

"It is well settled that misstatements made in the
course of concerted activity which denounce an
employer for his conduct in labor relations. . .
only forfeit the statutory protection when it is
evident that the statements are deliberately or
maliciously false."

(80 LRRM at 2285)

The 6th Circuit Court of Appeals in NLRB v. Cement Transport
Inc., 490 F.2d 1024, 85 LRRM 2292, 1974, states:

In the context of a struggle to organize a
union, "the most repulsive speech enjoys immunity
provided it falls short of a deliberate or reck-
less untruth" so long as the allegedly offensive
actions are directly related to activities pro-
tected by the Act and are not so egregious as to
be considered indefensible. Linn v. United Plant
Guard Workers of America, Local 114, 383 U.S. 53,
61, 61 LRRM 2345 (1966); NLRB v. Local 1229, Int'l
Brotherhood of Electrical Workers, 345 U.S. 464,
33 LRRM 2193 (1953); NLRB v. Washington Aluminum
Co., 370 U.S. 9, 17, 50 LRRM 2235 (1962). See
also Hugh B. Wilson Corp v. NLRB, 414 F.2d 1345,
1355-56, 71 LRRM 2827 (3rd Cir. 1969); Crown Central
Petroleum Corp v. NLRB, 430 F.2d 724, 731, 74 LRRM
2855 (5th Cir. 1970); NLRB v. Thor Power Tool Co.,
391 F.2d 584, 587, 40 LRRM 2237 (7th Cir. 1965).
(85 LRRM at 2296)

In Springfield, supra, the NLRB cited Linn v. United
Plant Guard Workers of America, 383 U.S. 53, 61 LRRM 2335,
1966, which states "the most repulsive speech enjoys immu-
nity provided it falls short of a deliberate or reckless
untruth". Also see Letter Carriers v. Austin, ___ U.S. ___,
86 LRRM 2740, 1974. Also see Stephens Institute, 241 NLRB
No. 133, 101 LRRM 1052, 1974, Greyhound, supra, and Mount
Desert Island, supra.

From the above case, a test of deliberately false or
maliciously false or recklessly untrue has to be met for a
statement to be unprotected.

Looking at Finding 5, the statement "discipline policy - none" is not an accurate statement. An accurate statement would have been "discipline policy - teachers do not understand or teachers are confused about the discipline policy". I judge the difference between the two statements to be more of a case of semantics and not a case of outright fabrication.

When I compare the statements in the Lincoln Survey Report to the statements in Texaco, supra, Exempt Transport, supra, Springfield, supra, plus the statements in Sony Mobile Oil Co. vs. NLRB, 357 F.2d 662, 61 LRRM 2553, CAC, 1966, and Walla Mfg. Co. vs. NLRB, 321 F.2d 759, 53 LRRM 2428, CADC, 1963, cited by the school district, I find the statements comparable.

Applying the above test to the case at hand, I find the Lincoln Survey Report to not be deliberately false or maliciously false or recklessly untrue.

2(b) DID THE BEA MAKE THE ASSERTIONS IN THE LINCOLN SURVEY REPORT IN THE SPIRIT OF LOYAL OPPOSITION - NOT OUT OF MALICE OR ANGER?

The NLRB in American Hospital Assn., 230 NLRB No. 10, 95 LRRM 1265, 1977, states:

In any event, the mere fact that an employee may be sarcastic or insulting in his pursuit of activity otherwise protected should not and does not in and of itself render the activity unprotected or him unfit for continued employment. It must indeed be "flagrant" or "fraught with malice." Here there is no indication of a malicious intent on the part of the employees. From a reading of Turkey Tactics, it is clear that there were areas of substantial concern to employees and they were motivated to try to change what they felt were inappropriate management decisions. Rather than maliciously attempting to hurt the Company I conclude from the leaflets, as well as the testimony of the discharges, that they were attempting to better a company for which they were working as professionals.

1 Lincoln Survey Report statements tried to maliciously hurt
2 the school district or management employees. Looking at
3 Findings 23, 24, 31, and 36 I find the Lincoln Survey Report
4 did have a negative effect on the school district and man-
5 agement employees. But, the Lincoln Survey Report did not
6 maliciously hurt the school district or management employ-
7 ees, or make obscene, insulting or ridiculing statements of
8 management employees. The BEA's first objective was not to
9 hurt anyone, but to attempt to improve the School District
10 (FF 12, 13, 18, 22, 23, 24). In addition, I find no anger
11 or malice in the Lincoln Survey Report or the BEA or the
12 teachers.

13 The BEA did make the assertions in the Lincoln Survey
14 Report in the spirit of loyal opposition - without malice or
15 anger.

16 The BEA with the Lincoln Survey Report meets all the
17 elements of the above stated legal standards. When the BEA
18 solicited, compiled and distributed the Lincoln Survey
19 Report, the BEA was engaged in protected concerted activi-
20 ties under the Jefferson Standard, supra, test as imple-
21 mented by the NLRB and the courts.

22 C. ANALYSIS OF VARIOUS MISCELLANEOUS ASSERTIONS
23 RAISED BY THE EMPLOYER

24 1. The employer alleges that the BEA was attempting
25 to replace the Lincoln administrator(s). This is alleged by
26 the employer to be illegal citing Puerto Rican Food Product
27 Corp. v. NLRB, 619 F.2d 153, 104 LRRM 2304, CA1, 1980, and
28 NLRB v. Red Top Inc., 455 F.2d 721, 79 LRRM 2497, CA9, 1982.

29 First, the facts do not support the allegation that the
30 Lincoln Survey Report was an attempt to change Lincoln
31 administrator(s). In findings 23 and 24 I do not find the
32 main thrust of the Lincoln Survey Report was to replace the
Lincoln administrators.

1 Second, even assuming for argument's sake that such was
2 the intent or motive of the NEA in conducting this survey,
3 that allegation must be analyzed under the following stan-
4 dard.

5
6 Two basic criteria must be satisfied before
7 employee concerted action over supervisory staf-
8 fing matters will be protected. First, the "emp-
9 loyee protest over a change in supervisory person-
10 nel [must] in fact [be] a protest over the actual
11 conditions of their employment. . . ." Slip op. at
12 4; see, e.g., NLRB v. Orla-Inn, 488 F.2d 498, 84
13 LRRM 2585 (10th Cir. 1973) (discharged supervisor
14 had attempted to alleviate employees' oppressive
15 workload); NLRB v. Gaernsey-Muskingum Electric
16 Co-op, Inc., 285 F.2d 8, 47 LRRM 2260 (6th Cir.
17 1960) (foreman allegedly made employees' job
18 harder because foreman was inexperienced and did
19 not understand the work). Mere sympathy for the
20 economic well-being of a discharged supervisor
21 divorced from any employee employment-related
22 concern of their own, for example, would not
23 qualify. Secondly, the means of protest must be
24 reasonable. Slip op. at 6. Generally, "strikes
25 over changes in even low level supervisory person-
26 nel are not protected." (104 LRRM at 2305)

27 In Red Top, supra, the 8th Circuit Court of Appeals
28 denied enforcement of an NLRB decision where the employees
29 did not press their grievance in good faith but instead were
30 engaged in a conspiracy to undermine the local manager. The
31 employees were attempting to have the local manager fired.
32 The employees lost their protection of the NLRA when they
33 threatened the local manager with physical violence.

34 The 1st Circuit Court of Appeals in Abilities and Good-
35 Will, Inc. v. NLRB 612 F.2d 6, 103 LRRM 2029, 1979, denied
36 enforcement of an NLRB order when the employer discharged 21
37 strikers who refused to return to work until the employer
38 re-hired a high level management official. The 1st Circuit
39 Court teaches:

40 The decision whether or not an employee protest
41 over a change in management personnel is protected
42 under the Act is a difficult one which requires

1 the balancing of competing interests. Tradition-
2 ally, the interest of the employer in selecting
3 its own management team has been recognized and
4 insulated from protected employee activity. No
5 court has ever held that the Act protects employee
6 protests over changes in top level management
7 personnel, nor has the Board previously advocated
8 such a rule.

9 The employees, however, do have an interest in
10 the composition of management personnel, and in
11 exceptional circumstances this interest may out-
12 weigh that of management. Thus, when the particu-
13 lar management official involved is a low level
14 foreman or supervisor who deals directly with the
15 employees' concern with the identity of that
16 person is directly related to the terms and condi-
17 tion of their employment, both the Board and the
18 courts have found that employee protests over
19 changes in supervisory personnel may be protected.
20 See NLRB v. Okla-Inn, 488 F.2d 498, 503, 84 LRM
21 2585 (10th Cir. 1973); NLRB v. Guernsey-Muskingum
22 Elec. Corp., Inc., 285 F.2d 8, 47 LRM 2260 (6th
23 Cir. 1960); NLRB v. Phoenix Mutual Life Insurance
24 Co., 167 F.2d 983, 22 LRM 2089 (7th Cir.), cert.
25 denied, 335 U.S. 845, 22 LRM 2590 (1948).

26 We agree with the result in these cases. With a
27 low level supervisor, the employer's interest in
28 having unfettered control over his selection is
29 reduced while the nexus between his identity and
30 the employees' work conditions is greater. Thus,
31 in such a case, to the extent that an employee
32 protest over a change in supervisory personnel is
33 in fact a protest over the actual conditions of
34 their employment, their protest would in principle
35 be protected activity under the Act.

36 the general rule adopted by the courts has been to
37 look at a variety of factors, including the rea-
38 sonableness of the means of protest, in order to
39 determine if the employees' activities were pro-
40 tected.

41 In so proceeding, courts have generally held
42 over Board protest that employee strikes over
43 changes in even low level supervisory personnel
44 are not protected. See Manning & Chaeidic, Inc. v.
45 NLRB, supra; American Art Clay Co. v. NLRB, supra;
46 Bohba House, Inc. v. NLRB, supra. On the other
47 hand, courts have found protected the writing of
48 letters expressing opposition. NLRB v. Phoenix
49 Mutual Life Insurance Co., 167 F.2d 983, 22 LRM
50 2089 (7th Cir.), cert. denied, 335 U.S. 845, 22
51 LRM 2590 (1948), or the simple voicing of com-
52 plaints. NLRB v. Guernsey-Muskingum Elec. Corp.,
53 Inc., 285 F.2d 8, 47 LRM 2260 (6th Cir. 1960).

103 LRM at 2030-31

1 From the above cases, the test to determine if the
2 activity is protected activities when protesting supervisory
3 personnel is:

4 (a) THE EMPLOYEE PROTEST OR ACTIVITY OVER A CHANGE IN
5 SUPERVISORY PERSONNEL MUST IN FACT BE A PROTEST OVER THE
6 ACTUAL CONDITIONS OF THEIR EMPLOYMENT.

7 (b) THE MEANS OF PROTEST MUST BE REASONABLE.

8 - GENERALLY STRIKES OVER CHANGES IN EVEN LOW LEVEL

9 SUPERVISORY PERSONNEL ARE NOT PROTECTED.

10 - LETTER WRITING EXPRESSING OPPOSITION AND/OR
11 VOICING OF COMPLAINTS FOUND PROTECTED.

12 THE LEGAL STANDARD APPLIED TO THE ASSERTION.

13 (a) Was the Lincoln Survey Report a protest over
14 actual conditions of the teachers' employment?

15 Looking at Finding 1, the building principal, Ms.
16 McKennan, has the right to set student discipline policy
17 within broad guidelines. Looking at finding 5, Ms. McKennan
18 explained her "different" discipline beliefs and values.
19 Looking at findings 6 and 22, the major problems at Lincoln
20 were student discipline and teacher evaluation. Looking at
21 finding 7, student discipline and teacher evaluation does
22 have an affect on teachers' working conditions. From the
23 above findings I can only rule that the Lincoln Survey
24 Report was about teachers' working conditions - conditions
25 of the teachers' employment. Also see the first part of the
26 Jefferson Standard test as implemented by the NLRB and the
27 courts.

28 (b) Was the means of protest, the Lincoln Survey
29 Report, reasonable - no strike?

30 Since the NEA and/or the teachers' actions did not
31 involve a strike, their activity, the survey, is within the
32 parameters of reasonableness, Abilities and Goodwill, 103

1 LARM at 2031. Because Ms. McKennan is a first line super-
2 visor the Lincoln Survey Report meets the test of low level
3 supervisory.

4 The activities of the BEA and/or the teachers have
5 already been found to be protected, concerted activities
6 under the U.S. Supreme Court's two prong test in Jefferson
7 Standard, 346 U.S. 465. That test includes an evaluation of
8 how reasonably the activity was conducted. For the above
9 reason, on both the facts and the legal standard, I reject
10 the school district's assertion about attempting to replace
11 the Lincoln administration.

12 2. The school district contends they did not inter-
13 fere with protected activities because the school district
14 did not discipline or specifically threaten to discipline
15 anyone for the Lincoln survey report.

16 It is true that the school district did not discipline
17 anyone or specifically threaten to discipline anyone (FF
18 39). But, this fact is not the test. The 9th Circuit Court
19 of Appeals in Bill Johnson's Restaurant vs. NLRB _____ F2d
20 _____, 109 LARM 3027, 1982, sets forth the following test:

21 The [NLRB] Board found that the restaurant
22 [employer] had violated section 8(a)(3) by threat-
23 ening and interrogating employees. An employer's
24 interrogation of an employee violates section
25 8(a)(1) if, under all the circumstances, the
26 interrogation reasonably tends to restrain or
27 interfere with the employee in the exercise of his
28 or her protected Section 7 rights. Clear Pine
29 Mouldings, Inc. v. NLRB, 632 F.2d 721, 725, 105
30 LARM 2132 (9th Cir. 1980), cert. denied, _____ U.S.
31 _____, 101 S.Ct. 2317, 68 L.Ed.2d 841, 107 LARM 2384
32 (1981); Pennsquitas Village, Inc. v. NLRB, 565
33 F.2d 1074, 1080, 97 LARM 2244 (9th Cir. 1977).
34 The test is whether the interrogation tends to be
35 coercive, not whether the employee was in fact
36 coerced. Clear Pine Mouldings, Inc. v. NLRB, 632
37 F.2d at 725; NLRB v. Anchorage Times Publishing
38 Co., 637 F.2d 1359, 1364, 106 LARM 2909 (9th Cir.
39 1981).

40 (109 LARM at 3031)

1 THE TEST IS WHETHER THE INTERROGATION TENDS TO BE COER-
2 CIVE.

3 In the case at hand, we find Dr. Poston wrote the March
4 7 letter and had the March 9 meeting to register a protest
5 about the Lincoln survey report and to stop the Lincoln sur-
6 vey report from happening in the future (FF 39). Applying
7 the test of Bill Johnson, supra, to the above facts it is
8 clear that Dr. Poston by his March 7 and 9 actions intended
9 to restrain, interfere and coerce Mark Jones and the BEA
10 from doing a Lincoln survey report in the future. The March
11 7 and 9 actions tend to be coercive (FF 39). The fact that
12 no one was disciplined or no one was specifically threatened
13 with discipline is immaterial. The school district's prof-
14 ered defenses are not defenses under the applicable legal
15 test, supra.

16 3. The school district contends they did not inter-
17 fere with protected activities because the nature of the
18 Lincoln Survey Report was immoderate, unreasonable and ir-
19 responsible. Further, the school district contends the
20 Lincoln Survey Report was not protected activities because
21 (a) the anonymous nature of the published remarks, (b) the
22 negative and derogatory nature of the remarks, (c) the wide
23 distribution beyond that needed for effective use of the
24 survey, (d) the apparent effort to embarrass the Lincoln
25 administration, (e) the non-specific statements with no
26 effort made to ensure accuracy or edit out blatant inaccura-
27 cies and inflammatory remarks, and (f) the general tenure of
28 harassment which underlay the preparation and distribution
29 of the report.

30 The alleged immoderate, unreasonable, and irresponsible
31 nature of the Lincoln Survey Report, or of the actions of
32 the BEA or the teachers and the alleged negative, derogatory,

1 embarrassing, inaccurate, inflammatory and harrassing nature
2 of the remarks have been analyzed under the proper statement
3 of the test in the second prong of the Jefferson Standard
4 test, supra, at pages 59-65 of this decision.

5 The alleged anonymous nature of the Lincoln Survey
6 Report and the alleged non-specific nature of the remarks
7 plus the wide distribution of the survey, are irrelevant to
8 a determination of whether the survey is protected, consen-
9 sed activity. The test is Jefferson Standard as implemented
10 by the NLRB and the courts. See the above two prong test of
11 Jefferson Standard.

12 - 4. The school district contends they did not inter-
13 fere with protected activities because the BEA violated the
14 understanding with Mr. Poston by acting in bad faith con-
15 cerning the contents of the survey report and its distribu-
16 tion. First, this is not the test. The test is Jefferson
17 Standard as implemented by the NLRB and the courts.

18 Second, it is true that Dr. Poston asked Ms. Butler to
19 request specific information from the Lincoln teachers (FF
20 11); that Ms. Butler did ask for specific information (FF
21 13); that the Lincoln Survey Report did not contain specific
22 information (FF 23); that the BEA informed Dr. Poston of a
23 limited distribution of the Lincoln Survey Report (FF 21,
24 33); and that the Lincoln Survey Report was widely distri-
25 buted (FF 30). The Circuit Court of Appeals in Texas,
26 supra, states:

27 The final contention of appellant [employer] is
28 that the promise of the union not to distribute
29 "undesirable" literature effectively waived the
30 employees' right to distribute the leaflet in
31 question. The courts and the Board have repeat-
32 edly held that a relinquishment or waiver of a
33 protected right must be "clear and unmistakable."
34 It is not clear on its face what the union's
35 promise meant in this case.

(80 LRM at 2285)

1 In the case at hand, I fail to see how the BEA waived
2 any of its rights to produce and distribute the Lincoln sur-
3 vey report by the above facts. Also for a complete discus-
4 sion of waivers see Teamsters Local 190 v. Lockwood School
5 System, Unfair Labor Practice charge 9-83, Board of Personnel
6 Appeals. Except for the above Texaco, supra, case, in all
7 other cases cited the employer had no prior knowledge or
8 control of the upcoming distribution of information. Noth-
9 ing in the case at hand required the BEA to get prior per-
10 mission to do the Lincoln survey report. I do not find the
11 school district's argument persuasive.

12 5. The school district contends that they did not
13 interfere with protected activities because the BEA failed to
14 use the Meet and Confer provisions of the collective bar-
15 gaining agreement.

16 First, this is not the test. See Jefferson Standard as
17 implemented.

18 Second, in Finding 21, Ms. Butler states the parties at
19 the February 9 meeting were using the provisions of Meet and
20 Confer without formally requesting Meet and Confer. Because
21 the record lacks any information to the contrary, I find Ms.
22 Butler's statement controlling. The parties were using the
23 Meet and Confer provisions of the collective bargaining
24 agreement, Finding 2.

25 I find the BEA by having an early fall 1983 dialogue
26 with Dr. Boston about the Lincoln problem (FF 8), by having
27 an ongoing dialogue during the corporal punishment incident
28 about the Lincoln problem (FF 11), and by the February 9
29 meeting (FF 21) was involved in normal Meet and Confer
30 activities provided for by the collective bargaining agree-
31 ment. I do not find the school district's argument persua-
32 sive. Additionally, the Meet and Confer section of the

1 Labor Agreement is not the exclusive means by which the
2 employees may present their concerns to the employer. The
3 Meet and Confer is only one aspect of protected, concerted
4 activity.

5 6. The school district contends they did not inter-
6 fere with protected activities because the BEA violated
7 Article V, Management Rights, violated XV, Teacher Evalua-
8 tion and violated XVI, Student Discipline of the collective
9 bargaining agreement by conducting the Lincoln survey report.
10 It is alleged that the BEA in essence waived their rights in
11 these areas. Neither party cites any case law for guidance.

12 First, in all the above cited articles of the collec-
13 tive bargaining agreement, none of the articles contain
14 "clear and unmistakable language" waiving the BEA's rights
15 to object to, or voice a complaint about, or grieve manage-
16 ment's actions. It is elementary labor law that a waiver
17 must be in "clear and unmistakable language" (Plumber's
18 Local 8669 vs. NLRB 600 F.2d 910, 101 LRRM, 2014, 1979;
19 NLRB v. CAC Plywood Corp., 385 U.S. 421, 64 LRRM 2065, 1967;
20 Teamsters Local 190 v. Lockwood School District, ULP 9-1983),
21 Board of Personnel Appeals.

22 Second, the Lincoln survey report can be reasonably
23 seen as an evaluation of the Lincoln school administration.
24 The Lincoln survey report is not an evaluation of the Lincoln
25 teachers. Assuming arguendo, that Article XV, Teacher
26 Evaluation, is a waiver of the BEA's rights to object to
27 Teacher Evaluation, Article XV is not a waiver covering
28 school administrators, someone outside the collective bar-
29 gaining unit.

30 Third, in Finding 7, I found student discipline and
31 teacher evaluation has an effect on the teacher's working
32 conditions. I read school district policy 531A and 532F to

1 mean a teacher has primary responsibility for student dis-
2 cipline and a teacher will be held accountable for his/her
3 student discipline performance. For the above reason, I do
4 not find the above sections of the Labor Agreement have been
5 violated.

6 7. The school district contends they did not inter-
7 fere with protected activities because with the Lincoln
8 survey report, the BEA violated management's rights section
9 of 39-31-303 MCA and violated the school board's authority
10 to hire and fire in Section 20-3-324(1) MCA.

11 It is unclear how the Survey Report diminished the
12 school district's authority to hire and fire. Their author-
13 ity remains intact.

14 Both Section 39-31-303 MCA and Section 20-3-324(1) MCA
15 gives management the right to hire or fire and direct the
16 work force. These rights are not unlimited. These rights
17 are balanced against the rights of employees to self orga-
18 nize, to form, to join, to assist any labor organization, to
19 bargain collectively and to engage in other concerted acti-
20 vities for the purposes of collective bargaining or other
21 mutual aid or protection free from interference, restraint
22 or coercion. Section 39-31-201 MCA.

23 The Lincoln survey report may have influenced the
24 school district's decision to retain the Lincoln administra-
25 tion staff at Lincoln. I believe the influence of the
26 Lincoln survey report was only minor because Dr. Poston
27 stated the Lincoln survey report had no effect on the school
28 district in carrying out its policy (PP 31). We must bal-
29 ance the employee's rights to complain about working condi-
30 tions-student discipline and teacher evaluation - against
31 the school district's right to hire, fire and direct the
32 work force.

1 Because of Dr. Poston's "no effect" statement, the bal-
2 ance of the two opposing rights is tipped in favor of the
3 BEA to engage in the Lincoln survey report. I do not find
4 section 39-31-303 MCA has been violated.

5 We should address one additional question. Was the BEA
6 wise in doing the Lincoln survey report?

7 The U.S. Supreme Court in Washington Aluminum, supra,
8 states "the reasonableness of the workers' decision to
9 engaged in concerted activity is irrelevant to the determi-
10 nation of whether a labor dispute exists or not" 50 LRRM at
11 2238. Also see Labor Board v. Mackay Radio and Telegraph
12 Co., 304 U.S. 333, 2 LRRM 510. From the above teachings of
13 U.S. Supreme Court, I find Ms. McKernan's testimony - that
14 if the BEA did not do the Lincoln survey report, the Lincoln
15 problem would have been corrected - immaterial in this deci-
16 sion (FF 31). The wisdom of the BEA's decision to engage in
17 the Lincoln survey report is not a determinant in this case.
18 The wisdom of the BEA is judged by its own membership (FF
19 17, 30).

20 For the above reasons, I conclude that the BEA's acti-
21 vities with the Lincoln survey report to be protected con-
22 certed activities under Section 39-31-201 MCA. By Dr.
23 Poston's March 7 letter and his March 9 meeting, Dr. Poston
24 tried to stop future Lincoln survey reports, protected
25 concerted activities. Looking at the record as a whole, and
26 specifically at the Meadowlark survey report, Finding 43, I
27 believe Dr. Poston's actions of March 7 and 9 to be more of
28 a one time violation of Montana's collective bargaining act,
29 Section 39-31-101 MCA. Because of this fact and because
30 Section 39-31-101 MCA, Policy, states it is the policy of
31 the State of Montana to remove certain recognized sources of
32 strife and unrest and to encourage practices and procedures

of collective bargaining to arrive at a friendly adjustment of all dispute. I will only order the school district to cease and desist from interfering with protected concerted activities. To require the school district to do such things as post notices would not be in harmony with the policy of Montana's Collective Bargaining Act.

COUNT II OF UNFAIR LABOR PRACTICE CHARGE 5-84

The BEA alleges that the employer refused to permit a union representative at the March 9 meeting with management which Mr. Jones reasonably believed might result in discipline is a violation of Section 39-31-401(1) MCA.

The above facts do not support the charge as stated. The facts of the case are:

1. Dr. Poston refused to let Mr. Russell attend the March 9 meeting because Mr. Russell had class responsibilities (FF 34).
2. The request for Mr. Russell to attend the March 9 meeting was requested by Mr. Russell (FF 34).
3. Mr. Jones never before the meeting or at the start of the meeting or during the March 9 meeting requested union representation (FF 35, 36).

The Board of Personnel Appeals first used the principle of Weingarten in Kessler Association of Teachers, MEA v. Kessler School, ULP 16, 30-1981, Board of Personnel Appeals. The U.S. Supreme Court in NLRB v. Weingartener, 420 U.S. 251, 88 LRM 2689, 1975 states that an employee can insist upon union representation at an employer's investigation interview. The BEA cited Pacific Telephone & Telegraph Co. v. NLRB, 711 F. 2d 134, 113 LRM 3529, CA9, 1983 as controlling. The 9th Circuit Court states:

If the right to insist on concerted protection against possible adverse employee action encompasses union representation at interviews such as those here involved, then in our view the securing of information as to the subject matter of the interview and a pre-interview conference with a union representative are no less within the scope

1 of that right. The Board's order that failure to
2 provide such information and grant such pre-inter-
3 view conferences constituted unfair labor prac-
4 tices is as permissible a construction of Section
5 7 as was the construction upheld in Weingarten.
6 Without such information and such conference, the
7 ability of the union representative effectively to
8 give the aid and protection sought by the employee
9 would be seriously diminished.

10 The second question presented by the petition is
11 whether the request for a conference must come
12 from the employee himself. Here, in the case of
13 Ebojo, Nevada and Martinez, the request came from
14 the union representative. As we note in footnote
15 3, the Supreme Court has stated that the right to
16 union representation at an investigatory interview
17 as defined by the Board is a right which must be
18 requested by the employee and which the employee
19 may choose to forego. See Weingarten, 420 U.S. at
20 257. We read this to mean that the employer need
21 not suggest that the employee have union represen-
22 tation and not, as Pacific Telephone argues, that
23 only the employee himself may so request. In our
24 judgment, once union representation has been
25 afforded, the representative may speak for the
26 employee he represents and either the union repre-
27 sentative or the employee may make the request for
28 pre-interview conference.

29 We affirm the decision of the Board holding that
30 Pacific Telephone violated Section 8(a)(1) by
31 failing to inform Flores and Ebojo as to the
32 subject matter of the interview and failing to
33 grant Ebojo, Nevada and Martinez pre-interview
34 conferences with their union representatives.

35

36 [Footnote 3]

37 The Weingarten court noted in several other
38 respects "the contours and limits of the statutory
39 right" as shaped by the Board in Mobile Oil and
40 other decisions: the employee must request repre-
41 sentation; his right is limited to situations
42 where he reasonably believes the investigatory
43 interview may result in disciplinary action; "the
44 employer is free to carry on his inquiry without
45 interviewing the employee and thus leave to the
46 employee the choice between having an interview
47 unaccompanied by his representative or having no
48 interview and foregoing any benefits that might be
49 derived from one"; and the employer is under no
50 duty to bargain with the attending union represen-
51 tative. Weingarten, 420 U.S. at 256-60.

52 (113 LRM at 3531)

53 The NLRB in Appalachian Power Co., 253 NLRB No. 135,
54 106 LRM 1041, 1960, accepted the administrative law judge
55 decision where (a) employees Parsons and Noeffinger refused

1 to do alleged unsafe work, (b) the two employees were directed to the maintenance superintendent Hill's office, (c) employee Parsons paged shop steward Goff to Hill's office, (d) shop steward Goff appeared at the meeting, (e) a management official inquired why Goff was at the meeting, (f) Goff replied "I'm here for the meeting", (g) Goff was ordered to leave by a management official, and (h) neither employee Parsons nor Hoffinger made any comment. The administrative law judge stated:

12 the General Counsel contends that Goff's assertion that he was present at the meeting as shop steward was a sufficient invocation of Weingarten's [420 U.S. 251, 80 LRM 2609] protections even without a specific request to the employer from the employees involved. This position stretches Weingarten beyond the boundaries currently demarked by the Board or the courts.

13 In Weingarten, the Supreme Court expressly endorsed the Board's view that the employee must request representation, but that he "may forgo his guaranteed right and if he prefers, participate in an interview unaccompanied by his union representative." N.L.R.B. v. J. Weingarten, supra, at 257. His continued participation is, then, a volitional matter and it is within his discretion to waive his guaranteed right.

14 The reason for vesting this choice with the employee is clear. As the Court explained in Weingarten, it is the individual employee who has an immediate stake in the outcome of the disciplinary process for it is his job security which may be jeopardized in any confrontation with management. *Id.* at 261. Therefore, it should be the employee's right to determine whether or not he wishes union assistance to protect his employment interests. The union representative's interest in attending such a meeting is not solely to safeguard the employee's interests but also to assure other employees that the aid and protection provided to one employee will be available to them in a similar situation. *Id.*

15 If, as the General Counsel contends, the right to be present at a disciplinary interview could be asserted by the union representative, the employee no longer would have the choice of deciding whether the presence of the representative was more or less advantageous to his interests. Thus, one of the fundamental purposes of the rule as articulated in Weingarten would be undermined.

1 While the facts in the present case are somewhat
2 distinguishable from the situation where a union
3 representative, completely on his own motion,
4 seeks to assert a representative role at a manage-
5 ment-conducted meeting, I am constrained to con-
6 clude that the present record does not establish
7 that the employees expressed a continued concern
8 for union representation since Parsons did not
9 renew his request or insist that Goff remain when
10 he had the opportunity of communicating that
11 desire directly to Hill.

12 I find that no precedents which would authorize
13 extending the Weingarten principle in the manner
14 suggested by the General Counsel. Rather, the
15 Board consistently has required that the involved
16 employee initiate the request for representation.
17 See, e.g., Kohl's Food Company, 249 NLRB No. 13,
18 104 LRRM 1063 (1989); First National Super Mar-
19 kets, Inc. d/b/a Pick-N-Pay Supermarkets, 247 NLRB
20 No. 162, 103 LRRM 1317 (1989); cited in Airco, Inc.,
21 249 NLRB No. 81, 104 LRRM 1153 (1989) (Chairman
22 Fanning's concurrence); Lennox Industries Inc.,
23 supra; Inland Container Corp., 240 NLRB No. 187,
24 100 LRRM 1421 (1978).

25 Further, the Board has held that the employee's
26 request for union representation must not only be
27 personal, but also must be directed to the man-
28 agement official who alone knows why he wishes to
29 communicate with the employee and is in a position
30 to assess whether or not to grant the employee's
31 request for representation. Thus, in Lennox
32 Industries, supra, an employee's request for union
33 representation which was made to a management of-
34 ficial prior to the commencement of a disciplinary
35 interview conducted by another supervisor, was
36 found to be insufficient to trigger Weingarten
37 where the request was not made known to the offi-
38 cial who called for and conducted the meeting.

39 In the present case, Parsons' call was not an
40 effective invocation of his Weingarten rights
41 since Hill was not privy to that call. There is
42 no reason to assume that Parsons was unaware of
43 his right to seek union representation or that he
44 harbored a belief that a renewed request would be
45 denied. Indeed, he knew he was entitled to rep-
46 resentation, for just the previous day Goff had
47 accompanied him to a meeting with production
48 superintendent Goldie Williams without incident.

49 The General Counsel suggests still another rea-
50 son for invoking Weingarten. He argues that
51 Parsons' and Moffsinger's failure to comment when
52 Goff spoke to Harrison in the corridor, served to
53 ratify Goff's statement that he was present as the
54 shop steward. However, since Hill was unaware of
55 Goff's presence and did not hear the exchange
56 between Goff and Harrison, * * * he could not be
57 aware of any ratification of Goff's statement by
58 Parsons or Moffsinger. In these circumstances,
59 Hill could extract no significance from the em-
60 ployees' silence. Since Hill had no knowledge of
61 Parsons' desire for union representation, it can-
62 not be said that the Respondent violated the
employees' Section 7 rights.

(106 LRRM at 1041-2)

From the above, the test is:

1. The employee who is being disciplinary interviewed has to ask for union representation. A union representative cannot ask for an employee.
2. The employee or the employee requested union representative may then ask for a pre-interview conference with the employer to determine the nature of the interview.
3. The employee and the union representative then are entitled to a private conference before the interview.
4. At both the pre-interview conference and the interview the union representative is free to speak.

Applying the above test to the case at hand, I find Mr. Jones did not perfect his rights to union representation at the March 9 meeting because he, himself, did not request union representation. I find no violation of Montana's collective bargaining act in Count II.

COUNT III OF UNFAIR LABOR PRACTICE CHARGE 5-84

The BEA charged that the school district threatened to reprimand staff members for contacting school board members a violation of 39-31-401(1) MCA, U.S. Constitution, and the Montana Constitution.

First, the facts in this case do not support the charge. In Finding 29, we found that except for one teacher, the record contains no evidence of the employer reprimanding, threatening to reprimand or intimidating a teacher for talking to a school board member about the Lincoln survey report, United Way letters or other BEA business. The record contains no evidence of the employer using School Board Policy 272F to interfere with any protected BEA business.

Second, in Finding 28, no one refuted Dr. Poston's contention that the report of the superintendent's cabinet meeting was not an accurate reflection. Dr. Poston's statement is the best evidence we have available in the record.

1 Third, the Board of Personnel Appeals and this hearing
2 examiner does not have the expertise or the jurisdiction to
3 rule on the U.S. and Montana constitutional issues and cases
4 cited by the parties. Specifically, the Board of Personnel
5 Appeals and this hearing examiner are not ruling on the
6 constitutional issues raised by the parties. See APSCME
7 Council #9 vs. State of Montana, ULP #11-79, Board of Per-
8 sonnel Appeals.

9 Because of the lack of evidence I find no violation of
10 Montana's Collective Bargaining Act in Count III. Because
11 of the lack of jurisdiction, I do not rule on the constitu-
12 tional issues raised in Count III.

13
14 CONCLUSION OF LAW

15 The Lincoln survey report was protected concerted
16 activities under Section 39-31-201 MCA. By his March 7
17 letter and his March 9 meeting, Dr. Poston tried to stop the
18 Lincoln survey report from happening again in the future, a
19 violation of Section 39-31-401(1) MCA.

20
21 RECOMMENDED ORDER

22 The Yellowstone County School District No. 2, Billings,
23 Montana or its agent, defendants, are ordered to cease and
24 desist from interfering with protected concerted activities
25 of the BEA or its members as stated in Section 39-31-201 MCA
26 by trying to stop future Lincoln survey reports. All other
27 counts of Unfair Labor Practice charge No. 5-84 are dis-
28 missed.

29 DATED this 22nd day of MAY, 1995.

30 BOARD OF PERSONNEL APPEALS

31 By: [Signature]
32 Mike D. Hodge
Hearing Examiner